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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 509

THE CITY OF TACOMA,
A MUNICIPAL CORPORATION, PETITIONER,

vs.

THE TAXPAYERS OF TACOMA, WASHINGTON, AND ROBERT SCHOETTLER, AS DIRECTOR OF FISHERIES, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED SEPTEMBER 27, 1957
CERTIORARI GRANTED DECEMBER 9, 1957

Supreme Court of the United States

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[fol. 1] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

No. 115209

THE CITY OF TACOMA, a municipal corporation, Plaintiff,

—v.—

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, Defendants.

COMPLAINT—Filed February 3, 1952

Plaintiff, complaining of defendants, alleges:

I

That at all times herein mentioned plaintiff is and was a city of the first class and a municipal corporation of the State of Washington, located in the County of Pierce therein, and owning, maintaining and operating works, plants and facilities for the generation, transmission and distribution of electricity for lighting, heating, fuel and power purposes pursuant to the provisions of Rem. Rev. Stat. of Washington, Sections 19488 et seq., and statutes supplemental thereto.

II

That now and at all times herein mentioned defendant Robert Schoettler is and was the duly appointed, qualified and acting Director of Fisheries, and the defendant John A. Biggs the duly appointed, qualified and acting Director of Game, of the State of Washington.

III

That on January 9, 1952, the City Council of plaintiff passed Ordinance No. 14386 of said City entitled:

"An ordinance providing for the making of certain additions and betterments to and extensions of the existing electric generating plant and system of the City of Tacoma; specifying and adopting a plan and system proposed therefor; declaring the estimated cost thereof as near as may be; providing for the method of the financing thereof; and providing for the construction thereof."

[fol. 2] which ordinance was duly published on January 10, 1952, and pursuant to the charter of said city became effective 10 days thereafter, and a duly certified copy of which is hereunto attached, marked Exhibit "A" and made a part hereof.

IV

That in accordance with the plan and system specified and adopted in said Ordinance No. 14386, plaintiff proposes to construct the works, plants and facilities therein described, including a concrete impounding dam, with spillway, of a height above tailwater of 325 feet at about Mile 65, and a concrete diversion dam, with spillway, of a height above tailwater of 185 feet at about Mile 52, on the Cowlitz River in Lewis County, Washington; and proposes to use the surplus funds of its electric generating plant and system insofar as the same may be available for that purpose, and to issue and sell its utility revenue bonds in an amount, not exceeding $146,000,000, sufficient to pay the remainder of the costs of said development.

V

That plaintiff on August 6, 1948, filed with the Federal Power Commission pursuant to the provisions of the Federal Power Act (16 U.S.C.A. Sec. 791 et seq.) its Declaration of Intention to construct said project (Project No. 2016 of said Commission) as described in said Ordinance No. 14386, and thereafter on December 28, 1948, followed this with its application to said Commission for a license under said Act so to do.

That thereafter on March 8, 1949, said Commission made and entered its Findings and Order that said Cowlitz

River is a navigable water of the United States and that the construction and operation of said project would affect public lands and the navigable capacity of said river and the interests of interstate and foreign commerce, and holding that said project came within its jurisdiction under said Act, a full, true and correct copy of which Findings and Order is hereunto attached, marked Exhibit "B" and made a part hereof. That no repeal or review was ever [fol. 3] taken or sought of said order.

That thereafter a hearing was duly held on said application for said license before said Commission, and on November 28, 1951, said Commission rendered its opinion directing issuance of said license to plaintiff, and fixing the terms and provisions thereof. That full, true and correct copies of said opinion, said license, including plaintiff's acceptance thereof, and of the order of said Commission issued January 24, 1952, denying any rehearing thereon, are hereunto attached, marked Exhibit "C", "D" and "E", respectively, and made a part hereof. That said license is now in full force and effect.

VI

That this action is brought by plaintiff under authority of Rem. Rev. Stat. of Washington, Sections 784-1 et seq., relating to declaratory judgments, and of Rem. Rev. Stat. of Washington, Sections 5616-11 et seq., providing for the testing and determining of the validity of the issuance and sale of bonds, for the purpose of testing and determining plaintiff's right to issue and sell bonds as provided and proposed in said Ordinance No. 14386, for the purposes therein provided, including the constructions of said dams on said Cowlitz River, within the migration range of anadromous fish as determined by the Director of Fisheries and the Director of Game of the State of Washington, and particularly for the purpose of determining whether or not Chapter 9, Laws of 1949, purporting to create a sanctuary for the protection of anadromous fish life on said Cowlitz and other rivers, and to make it the duty of the Director of Fisheries and the Director of Game of the State of Washington to acquire and abate any dam or other obstruction on said rivers or to acquire any water

rights which may become vested therein, or any other law of the State of Washington, is a bar to such constructions and to the issuance and sale of bonds by plaintiff for such purposes; and further to test and determine any other question that may be raised by anyone herein as to the right of plaintiff to construct such project pursuant to said [fol. 4] license, and as to the validity of the issuance and sale of bonds for said purposes.

VII

That the provisions of said Chapter 9, Laws of 1949, relating to the use of the waters of said Cowlitz and other rivers, and to the construction and maintenance of dams thereon, are contrary to and in direct conflict with the provisions of the Federal Power Act relating to and providing for the use of such waters, and said act is unconstitutional or inapplicable under the provisions of Article VI of the Constitution of the United States and Article I, Section 2, of the Constitution of the State of Washington.

That said Chapter 9, Laws of 1949, is further unconstitutional under the provisions of Article II, Section 19, of the Constitution of the State of Washington, in that the subject thereof is not expressed in the title of said act, and it embraces more than one subject; and is further unconstitutional under the provisions of Article II, Section 1, of said State Constitution in that it contains an unlawful delegation of legislative authority.

VIII

That pursuant to the provisions of said Rem. Rev. Stat. of Washington, Sections 5616-11 et seq., the Court is directed, upon the filing of the complaint herein, to name a representative taxpayer or taxpayers of plaintiff City upon whom service of process in this action shall be made as the representative of all taxpayers of said City, except such as may intervene as provided in said statute; and in case such taxpayer or taxpayers so named shall default, to appoint an attorney to defend this action on behalf of all the taxpayers of said City; and to allow the taxpayer or taxpayers or such attorney so appointed a reasonable attorney's fee and costs to be paid by the plaintiff herein.

Wherefore, plaintiff prays:

1. That the Court forthwith make and enter herein an order naming a representative taxpayer or taxpayers upon whom service of process herein shall be made;

[fol. 5] 2. That in case of default by said taxpayer or taxpayers, the Court appoint an attorney herein to defend this action on behalf of all the taxpayers of said City.

3. That the Court test, declare and determine the validity of said bonds and plaintiff's right to issue and sell the same as provided and proposed in said Ordinance No. 14386, for the purposes therein provided, including the construction of said dams on said river; and particularly that the Court determine whether or not said Chapter 9, Laws of 1949, is valid and applicable and a bar to construction of said dams on said river by plaintiff pursuant to the provisions of said license granted plaintiff by said Federal Power Commission; and further that the Court test, declare and determine any other question that may be raised by anyone herein as to the right of plaintiff to construct said project pursuant to said license and as to the validity of the issuance and sale of said bonds for the purposes aforesaid.

4. That the Court allow said taxpayer or taxpayers or said attorney so appointed a reasonable attorney's fee and costs to be paid by plaintiff herein.

5. That plaintiff have such other and further relief, and the Court make such other and further findings, declarations and determinations as it deems necessary and meet to establish the validity of said bonds and the issuance and sale thereof.

Clarence W. Boyle, Corporation Counsel, Dean Barline, Assistant Corporation Counsel, E. K. Murray, Special Counsel, Attorneys for Plaintiff.

[fol. 5a] *Duly sworn to by John H. Anderson, jurat omitted in printing.*

[fol. 6] EXHIBIT "A" TO COMPLAINT

ORDINANCE NO. 14386

BY ERDAHL:

An ordinance providing for the making of certain additions and betterments to and extensions of the existing electric generating plant and system of the City of Tacoma; specifying and adopting a plan and system proposed therefor; declaring the estimated cost thereof as near as may be; providing for the method of the financing thereof; and providing for the construction thereof.

BE IT ORDAINED BY THE CITY OF TACOMA:

Section 1. That the existing electric generating plant and system owned and operated by the City of Tacoma for the generating of electric energy and supplying the same to the City of Tacoma and to the inhabitants thereof and to any other persons for the public uses and purposes of lighting, heating, fuel and power, is inadequate to supply the increased consumption of and demand therefor, and such increased consumption and demand and the public interest requires the construction of certain additions and betterments to and extensions of said plant and system.

Section 2. That the City of Tacoma hereby specifies and adopts the plan and system hereinafter set forth for the making of said additions and betterments to and extensions of said existing plant and system, to-wit:

(a) Construction of a concrete impounding dam, with spillway, about 545 feet in height above bedrock and 325 feet above tailwater in the Southwest quarter of Section 10, Township 12 North, Range 3 East, W.M., at about a mile 65 on the Cowlitz River approximately two and one-half miles east of the town of Mossyrock, Lewis County, Washington, and being about 1300 feet in length at its crest; a powerhouse with substructure built integrally with the toe of the non overflow section of the dam housing three vertical turbine-generator units of 75,000 kilowatts capacity each, with provision for a fourth unit of 75,000 kilowatts

capacity to be installed upon authorization by the City Council of the City of Tacoma and the Federal Power Commission; the necessary pressure pipes extended through said dam to said powerhouse; step-up transformer and switching station; and all machinery, appurtenances, appliances and facilities necessary for a hydroelectric plant, said dam to be known as the Mossyrock Dam.

(b) Construction of a concrete diversion dam with, spillway, about 250 feet in height above bedrock and 185 feet in height above tailwater in the Southwest quarter of Section 20 and the Northwest quarter of Section 29, Township 12 North, Range 2 East, W. M., at about a mile 52 on the Cowlitz River and about a mile southwest of the town of Mayfield, Lewis County, Washington, and about 850 feet in length at its crest; a tunnel about 880 feet long on the north bank of the Cowlitz River with associated concrete headworks, fish screens, forebay, gate house and steel penstocks necessary to conduct the water from said dam to the powerhouse; a concrete powerhouse located on the north bank of the Cowlitz River below said dam housing three vertical turbine-generator units of 40,000 kilowatts capacity each, [fol. 7] with provision for a fourth unit of 40,000 kilowatts capacity to be installed upon the authorization of the City Council of the City of Tacoma and by the Federal Power Commission; step-up transformer and switching station and all machinery, appurtenances, appliances and facilities necessary for a hydroelectric plant, said dam to be known as the Mayfield Dam.

(c) Construction of a double circuit 230 kilovolt transmission lines on double circuit steel towers from each of the two aforesaid powerhouses to a junction between the two dams and thence in a northerly direction by the most feasible route to the Cowlitz substation on the outskirts of the City of Tacoma, said transmission lines to have an aggregate length of about 60 miles.

(d) Construction of step down transformer and switching equipment in said Cowlitz substation necessary for the incoming power.

(e) Construction of such fish hatcheries, fish ladders, fish traps, or other fish handling facilities or fish protective

devices as shall be approved and required by the Federal Power Commission.

(f) Construction of residences for employes and other necessary buildings at said dams and powerhouse sites together with utilities therefor; necessary roadway and communication systems; temporary spur railroad tracks; removal of timber and debris from areas to be inundated; and construction of such other improvements as may be required to complete said project.

(g) Acquisition by purchase, condemnation, or otherwise of 16,000 acres of land, more or less, for dam sites, powerhouse sites, reservoirs and storage basin sites, operator's villages, tunnels, construction offices; fishways, fish hatcheries and other fish facilities, gravel pits, roads, bridges and necessary right of ways, said lands being located in

Sections 1, 2, 3, 9, 10, 11, 16, 19, 20, 21, 27, 28, 29 and 30 of Township 12 North, Range 2 East of Willamette Meridian; Sections 25, 26, 34 and 35 of Township 13 North, Range 2 East, W.M.; Sections 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23 and 24 of Township 12 North, Range 3 East, W.M.; Sections 7, 18, 19, 20, 27, 29, 30, 32, 33, 34, 35 and 36 of Township 12 North, Range 4 East, W. M.; Sections 1, 2, 3, 4, 11 and 12 of Township 11 North, Range 4 East, W.M.; Sections 26, 29, 30, 31, 32, 33 and 34 of Township 12 North, Range 5 East, W. M.; and Sections 2, 3, 4, 5 and 6 of Township 11 North, Range 5 East, W. M.; all of said lands being located in Lewis County of the State of Washington,

also acquisition of right of ways for relocation of those portions of state, county and private roads and highways, and telephone and power lines inundated by storage water impounded behind said dams; acquisition of right of ways for such spur railroad tracks or access roads as may be required to be extended from the closest feasible point on available railroads or public highways to a point at or near said dam sites; acquisition of such fish hatchery sites and water rights as may be required by the Federal Power Commission; acquisition of right of ways for the above described [fol. 8] transmission lines from said power houses to the

existing Cowlitz substation near Tacoma; and acquisition of all water rights, franchises, easements, right of ways and privileges which may be required in connection with any improvement authorized by this ordinance.

The construction of this project has been licensed by the Federal Power Commission under Project No. 2016, and the construction herein authorized shall conform with the requirements of such license.

Section 3. That the entire improvement consisting of the additions and betterments to and extensions of the said existing electric generating plant and system shall be known and designated as Cowlitz Power Development. That the total estimated cost of said Development declared as near as may be is the sum of $146,000,000.00.

That the gross revenues of the electric generating plant and system of the City of Tacoma, now owned by it, or which may be hereafter acquired at the current rates charged and to be charged for electric energy generated thereby, will be sufficient to meet all expenses of operation and maintenance including the operation and maintenance of the proposed additions, betterments and extensions thereto and all charges heretofore created against said revenues, including the charges thereon heretofore created by Ordinance No. 12037, passed July 21, 1941, Ordinance No. 12140, passed December 17, 1941 as amended by Ordinance No. 12176, passed February 4, 1942, Ordinance No. 12398, passed May 19, 1943, Ordinance No. 12452, passed September 1, 1943, Ordinance No. 12523, passed Mar. 15, 1944, Ordinance No. 12561, passed August 9, 1944, Ordinance No. 13846, passed April 26, 1950, and Ordinance No. 13992, passed October 11, 1950, and to permit the setting aside of a fixed amount of said revenues without regard to any fixed proportion thereof sufficient to pay the interest on the bonds to be issued as herein provided and to pay and redeem the principal at maturity.

Section 4. That in order to carry out the plan and system specified and adopted herein for the construction of said Development the City of Tacoma shall use the surplus funds of the electric generating plant and system insofar as the

same may be available for that purpose, and shall issue and sell, pursuant to law, its utility revenue bonds in an amount sufficient to pay the remainder of the costs of the said Development.

Said bonds shall be issued in ten series, to be designated as Series A, Series B, Series C, Series D, Series E, Series F, Series G, Series H, Series J and Series K. That Series A, Series B, Series C, Series D, Series E, Series F, Series G, Series H, Series J issues shall each be in the amount of $15,000,000.00 and the Series K issue in the amount required to complete such Development, but in no event to be in excess of $11,000,000.00. As between the various series of bonds to be so issued there shall be no priority with respect to payment of principal or interest out of the revenues of said plant and system. No bonds or other evidences of indebtedness payable out of the revenues of said plant and system shall be issued by the City of Tacoma, nor any charge of any kind so created, having any priority over the bonds herein authorized to be issued with respect to payment of principal or interest out of the revenues of said plant and system.

[fol. 9] That each of said series of bonds shall bear the date of their issue, shall bear interest not exceeding six per cent per annum, shall be numbered from one up consecutively, and shall contain such terms and conditions, be in the form and in the denominations, executed in the manner and payable at the times and places as the Council shall by ordinance passed subsequent hereto in the case of each of said series, authorize and determine, and shall be sold in such manner as the Council shall deem for the best interests of the City; and shall be payable only out of such special fund as the Council shall by ordinance hereafter create.

Section 5. That the Commissioner of Public Utilities be and he is hereby authorized to proceed with the construction of said improvement and in connection therewith to use the surplus funds of the electric generating plant and system of the City of Tacoma insofar as the same may be available for that purpose.

The Council shall by ordinance direct the issue and sale of the bonds hereinabove authorized in such manner and at such times as it shall direct and in accordance with law.

Passed Jan 9 1952

JOHN H. ANDERSON
Mayor

Attest: JOSEPHINE MELTON
City Clerk

STATE OF WASHINGTON)
County of Pierce) ss.

I, JOSEPHINE MELTON, City Clerk of the City of Tacoma, Pierce County, Washington, hereby certify that the attached is a full, true and correct copy of Ordinance No. 14386, passed by the City Council on January 9, 1952.

WITNESS my hand and the seal of said City this 4th day of February, 1952.

(Signed) JOSEPHINE MELTON
City Clerk

(Seal of City of Tacoma)

[fol. 10] EXHIBIT "B" TO COMPLAINT

FEDERAL POWER COMMISSION

Docket No. E-6156

March 8, 1949

Mr. J. Frank Ward, Superintendent
Light Division, Department of
Public Utilities
City of Tacoma
Tacoma 2, Washington

Dear Mr. Ward:

There is enclosed a copy of the Commission's findings and order upon the City of Tacoma's declaration of intention to construct a water power project on the Cowlitz River in Lewis County, Washington, with dams at the Mossyrock and Mayfield sites.

The Commission has found, among other things, that construction and operation of the proposed project would affect public lands or reservations of the United States and that the interests of interstate or foreign commerce would be affected by the construction and operation of either or both of the reservoirs proposed by the City.

It should be noted that the ordering paragraph is substantially the same as the provision in Sec. 23 (b) of the Federal Power Act prohibiting construction until the City shall have received a license and this order places no prohibition upon construction which is not contained in the Federal Power Act.

By direction of the Commission.

Very truly yours,

/s/ LEON M. FUQUAY
Secretary

Enclosure No. 16200

[fol. 11] UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Nelson Lee Smith, Chairman; Thomas C. Buchanan, Claude D. Draper, Leland Olds and Harrington Wimberly.

March 8, 1949

In the Matter of)
) Docket No. E-6156
City of Tacoma, Washington)

FINDINGS AND ORDER OF THE COMMISSION

On August 6, 1948, the City of Tacoma, Washington (hereinafter referred to as "declarant") filed a declaration of intention under the provisions of Section 23(b) of the Federal Power Act (16 U.S.C. 817) to construct a water power project on Cowlitz River in Lewis County, Washington, with dams at the Mossyrock and Mayfield sites.

The project, as proposed by declarant, would consist of:

(a) A dam about 350 feet high and 1,300 feet long at about mile 65 on Cowlitz River and about 3 miles

east of the town of Mossyrock; a reservoir having a storage capacity of approximately 1,375,700 acre feet, a drawdown of 100 feet, and usable storage of 975,000 acre feet; and a powerhouse with an installed capacity of 225,000 kilowatts in three units.

(b) A dam about 225 feet high and 900 feet long at about mile 52 on Cowlitz River and about one mile west of the town of Mayfield; a reservoir having a storage capacity of approximately 127,000 acre feet; a drawdown of 10 feet, and usable storage of 21,000 acre feet; and a powerhouse with an installed capacity of 120,000 kilowatts in three units.

(c) A transmission line approximately 50 miles long with substation in Tacoma, the necessary switch yards and appurtenant facilities.

The Governor and the Department of Public Utilities, State of Washington, were notified of the filing of the declaration.

The reservoir to be created by the Mossyrock Dam would encroach upon or flood portions of at least five parcels of lands of the United States extending from T. 11N., R. 4 E., to T. 12N., R. 5 E., inclusive.

The Cowlitz River, a tributary of the Columbia River in southwestern Washington, drains the western slope of the Cascade Range from Mount Rainier on the north to Mount Adams and Mount St. Helens on the south. The Cowlitz flows westerly for about 100 miles, then turns south for 30 miles and joins the Columbia River at Longview, Washington, the point of junction being about 65 miles above the mouth of the Columbia River. At the point of junction both the Columbia and Cowlitz are tidal rivers and the Cowlitz has an average flow at the point of junction of about 10,000 cubic feet per second. The Cowlitz has a total drainage area of 2,490 square miles.

[fol. 12] The Cowlitz River has been navigated by steamers having drafts of from 2½ to 4 feet and, except during periods of lowest water, the lightest draft boat could reach Toledo which is 34 miles above the mouth of the river. During high stages the boats have navigated about 10 miles

above Toledo. In the past the river has been used extensively for the transportation of logs although the Commission staff's investigation has not established the volume of logging or the limits of the stretch or stretches of the river used for transporting logs.

By 1913 the United States Government had completed a federal navigation project on the Cowlitz River to provide for a channel of 4 feet low-water depth and 50 feet width from the mouth to Ostrander (8 miles); thence of 2½ feet depth and width of not less than 50 feet to Castle Rock (9 miles); thence of 2½ feet depth and width of not less than 40 feet to Toledo (17 miles). The navigation work performed consisted of snagging, dredging and regulating works. The upper limit of this existing federal navigation project is at river mile 34 (Toledo) which point is only 18 miles downstream from the lower, or Mayfield Dam, as proposed in the declaration.

The average flow of the river at the Mayfield site (mile 52) is about 5,150 c.f.s. and the average flow at the stream gaging station at Castle Rock (mile 17) for the years 1927-1945 is reported to be 8,212 c.f.s. When such flow occurred in the past, the stage at Castle Rock was 9.4 feet. During periods of average stream flow the usable storage capacity of the Mayfield Reservoir (21,000 acre feet) would be sufficient to withhold entirely all stream flow past that site for a period of two days. The Mossyrock Reservoir, with a usable storage of 975,000 acre feet, or 46 times that of the Mayfield Reservoir, could withhold the entire flow for a relatively longer period. Should the entire flow of the river be impounded by either or both of the proposed reservoirs during periods of average stream flow the flow at Castle Rock would be reduced to about 3,000 c.f.s. and the stage would be reduced to 7.1 feet, resulting in a reduction of stage at Castle Rock of more than 2 feet under average flow conditions. Under these circumstances the effect of such storage in either reservoir could be as much as 2 feet on the stream gage at Castle Rock (mile 17).

In a letter dated December 1, 1948, the Commission advised declarant of the facts disclosed by an investigation made by the Commission's staff of the proposed construction and further advised declarant that the staff intended

to recommend that the Commission find that construction of the project would affect lands of the United States and would also affect the interests of interstate or foreign commerce. This letter was sent to afford declarant an opportunity to controvert the facts disclosed by the staff investigation and to object to the findings proposed by the staff.

On December 28, 1948, declarant filed an application for license under the Federal Power Act requesting authority to construct, operate and maintain the previously described project (Project No. 2016), and by letter dated January 6, 1949, advised the Commission that the declarant recog- [fol. 13] nized the jurisdiction of the Commission over the proposed project and is in agreement with the staff's conclusions set forth in the Commission's letter of December 1, 1948. Since no requests for a hearing on jurisdictional questions have been received, and in order to determine the question of jurisdiction formally, the data and information referred to herein has been presented to and considered by the Commission.

The Commission *finds*:

(1) Construction and operation of the project proposed by the declarant would affect public lands or reservations of the United States.

(2) Boats have navigated the Cowlitz River to Toledo and during high water stages boats have navigated the river for some distance above Toledo.

(3) The United States has improved the Cowlitz River by snagging, dredging and regulating works from its mouth to Toledo to obtain a minimum navigable depth of 2½ feet.

(4) The Cowlitz River from its point of junction with the Columbia River to at least Toledo is a navigable water of the United States and may be a navigable water of the United States for some distance upstream from Toledo.

(5) Either or both of the proposed reservoirs would have sufficient usable storage capacity to enable either or both of them to be operated in such a manner as to materially affect the water stage in

the Cowlitz River at Toledo or below, which section of the river we have found to be a navigable water of the United States, and thus the construction of either or both of the proposed reservoirs would materially affect the navigable capacity of the Cowlitz River.

(6) The interests of interstate or foreign commerce would be affected by the construction and operation of either or both of the reservoirs proposed by the declarant.

The Commission *orders*:

As provided in Section 23(b) of the Federal Power Act the City of Tacoma, before commencing construction of either of the proposed reservoirs, shall have received a license therefor under the provisions of the Federal Power Act.

By the Commission.

/s/ Leon M. Fuquay (s)
Leon M. Fuquay,
Secretary.

Date of Issuance: March 8, 1949

[fol. 13A] Exhibit "C" to Complaint

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION
OPINION NO. 21

In the Matter of)
) Project No. 2016
City of Tacoma, Washington)

[fol. 13B] In the Matter of)
) Project No. 2016
City of Tacoma, Washington)

APPEARANCES

For Applicant, City of Tacoma
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J. D. Barline, Esq.

For Interveners, Department of Fisheries and Department of Game of the State of Washington
William E. Hicks, Esq.

For Intervener, Washington State Sportsmen's Council, Inc.
Lee Olwell, Esq.

For Intervener, The Honorable Smith Troy, Attorney General, State of Washington
Edgar J. Wright, Esq.

For the Staff of the Federal Power Commission
Willard W. Gatchell, Esq.
John C. Mason, Esq.

(Special Appearances entered by Counsel for purposes of hearing by the Commission in Tacoma, Washington, November 20, 1950)

For the People of Lewis County, Washington, and the Lewis County Development League
Don G. Abel, Esq.

For Various Persons and Interests Opposing Construction of the Cowlitz Dams
Harold Pebbles, Esq.
Ralph Armstrong, Esq.

[fol. 13C] UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of)
) Project No. 2016
City of Tacoma, Washington)

OPINION NO. 221

BY THE COMMISSION:

The City of Tacoma, a municipality in the State of Washington, on December 28, 1948 filed an application for a license under Section 4 (e) of the Federal Power Act for authority to construct, operate, and maintain the Mossyrock and Mayfield developments on the Cowlitz River in Lewis County, Washington, designated as Project No. 2016.

The Mossyrock dam would be located at about river mile 65 and the Mayfield dam at about river mile 52. The Mossyrock power plant would have an initial power installation of three generating units of 75,000 kilowatts each, with provision for a fourth unit of the same size. The initial installation at Mayfield would be three 40,000-kilowatt units with provision for a fourth unit of the same size, thus giving the two plants a combined capacity of 460,000 kilowatts. Thus, these two plants would add 190 percent to the present capacity of the Tacoma generating plants and nearly 10 percent to the present combined total installation of 4,700,000 kilowatts in the Pacific Northwest power pool. Three years would be required after authorization the proposed plants could be placed in operation, this project being one of the most readily available sources of power in the Pacific Northwest.

[fol. 13D] Since the City of Tacoma's generating, transmission and distribution system is already interconnected with the other public and privately-owned power plants operating in the Pacific Northwest power pool, the addition of these sizable units west of the Cascade Mountains would be of benefit to all of the power consumers in the area, particularly as a diversity of rainfall on both sides of the Cascades would inable the City to firm up some of the other developments operating in the power pool, especially during the winter months when the power load is highest. In

addition, these plants would be located within a relatively short transmission distance from Tacoma, Seattle and Portland, the heavy load centers in the area.

The severe power shortage in the Pacific Northwest is a matter of national concern, particularly when every effort is being made to increase the industrial output and the output of those materials calling for large blocks of low-cost power, and of course the principal increase in the power demands of the area has been due to the expanding defense requirements which must be met. Furthermore, the serious regional power shortage in this area will not be met by the planned Federal power construction, but additional generating plants must be built as rapidly as possible, especially where, as here proposed, the installation can be made with a minimum loss of time and with maximum assistance to other power suppliers.

On the other hand, Section 10 (a) of the Federal Power Act requires that licenses shall be issued only for those power projects which in the judgment of the Commission are best adapted to comprehensive plans for full development of those streams subject to Federal jurisdiction and, of course, other benefits than power production may be [fol. 13E] secured by utilization of streams in their natural state or through improvements. The engineering possibility of realizing the anticipated power benefits from the proposal of the City is not to be seriously questioned, nor is it denied that large flood control and incidental navigation benefits would result. However, the Cowlitz River is extensively used for spawning by anadromous fish, and the City is confronted by those who contend that this natural river use will be completely destroyed by the proposed dams.

The Mossyrock dam would be about 510 feet in height and the Mayfield dam about 240 feet in height, both above bedrock, and it is said that anadromous fish would be unable to reach the pools above the dams, particularly the higher of the two, during the spawning season, nor could the small fingerlings find their way downstream. Fish ladders having a vertical ascent of 65 feet are in operation at the Bonneville dam and the same facilities are planned at the McNary dam just upstream to make possible an ascent of 92 feet, but no fish ladders over 200 feet in height

have been installed at any other dam. Furthermore, it is said, the other fish handling facilities and conservation measures proposed by the City will not be effective and the present valuable fishery resources will be destroyed.

In addition to offering physical obstacles to fish passage upstream and downstream, the State Attorney General, the Department of Fisheries and Game, and the Washington State Sportsmen's Council, Inc., object to the proposed dams on legal grounds. They argue that the application should be denied because construction of any dam greater than 25 feet in height is forbidden by the State Columbia River Sanctuary Act in any tributary of the Columbia downstream from the McNary dam and within the migra- [fol. 13F] tory range of anadromous fish. We recognize, of course, that any State statute represents an expression of the intention of the Legislature by which it was enacted, but since we are dealing here with the applicability of a Federal statute it is equally clear that a State statute cannot stand as a complete legal bar to authorization of a State prohibited project if in the judgment of the Commission that project is best adapted to comprehensive plans and would be of unmistakable public benefit. We should not, merely in reliance upon the State Sanctuary Law, attempt to escape responsibility for considering the broader public interest questions before us under the Federal Power Act.

Another bar to approval of the application suggested by the interveners, and apparently relied upon by the Examiner, is the Columbia River Review Report submitted in 1948 by the United States Army Corps of Engineers. This is presented to us as a specific recommendation for indefinite postponement of any water-power development on the Cowlitz River because that river was included in the Lower Columbia Fisheries Plan prepared by the United States Fish and Wildlife Service in cooperation with the Fish and Game Commissions of the States of Washington, Oregon and Idaho, and because the Army Engineers were said to be of the opinion that the Cowlitz River was needed as a spawning area for fish and that there was an adequate supply of electric power available elsewhere in the Columbia Basin.

We note initially in this connection that while Congress has appropriated funds for certain of the developments included in the 1948 report it has not given its approval to the Lower Columbia Fisheries Plan nor to the basin plans of the Army Engineers. The current views of the Chief of Engineers were expressed in his report to this [fol. 13G] Commission under Section 4 (e) of the Federal Power Act on the application of the City of Tacoma for a license for Project No. 2016. In reporting to the Commission the Chief of Engineers says that no recommendation had been made in the Review Report for development of the Cowlitz sites because of the interest of local communities in undertaking such development and because of the need for correlation of power development by local interests with the needs of preservation of the fishery resources. In other words, in 1948 the Chief of Engineers recognized the local interest of the City of Tacoma in development of the Cowlitz, which would render Federal investments unnecessary, and he was of the opinion that the power supply was then adequate. As we now see, the power supply is presently inadequate and the City of Tacoma desires to proceed.

The comments of the Commission upon the 1948 Review Report were, of course, directed principally to the power features of the plan there submitted. The Commission has neither the responsibility nor the necessary staff for making an independent evaluation of other uses than power in commenting upon such comprehensive plans of the Army Engineers as were submitted in 1948 and it made no attempt at that time to weigh the merits of the proposal of the United States Fish and Wildlife Service to postpone consideration of the development of those streams tributary to the lower Columbia River. Since the Army Engineers did not then propose Federal development of the Cowlitz River, the Commission was justified in taking the recommendations of the Fish and Wildlife Service at their face value. Upon the filing of the instant application, however, the responsibilities assigned to the Commission under the Federal Power Act made impossible any further postponement of consideration of the development of the Cowlitz River and required full and impartial evaluation of the

[fol. 13H] applicant's proposal on its merits and the objections thereto, including full opportunity to all Federal and State agencies in any way interested in the proposal to present their views and relevant information in support of their recommendations.

This leaves for discussion the claims of the applicant and of the fishery interests with respect to the fishery resources of the Cowlitz River upstream from the Mayfield dam, the effects reasonably to be anticipated from construction of the proposed dams, and the economic and public benefits under natural conditions and with the improvements proposed by the City.

Since the stream discharge below the Mayfield dam would be smoothed out seasonally to a substantial degree, there would not appear to be any jeopardy to the fish population below that dam if the construction proposed is undertaken. In fact, the evidence indicates that there may be an increase in those fishery resources. The daily power operations at Mayfield should be such as not to injure the fish, and we should reserve the right to consider this situation from time to time as occasion arises.

The important anadromous fish inhabiting the Cowlitz watershed are the spring chinook, fall chinook, silver salmon, the steelhead and cutthroat trout, and the smelt.

The salmonoids and the smelt perish after spawning while the sea-run trout spawn several times before dying. Each race of the anadromous fish of Cowlitz River watershed utilize spawning areas suitable to its ecological niche and each has well defined migratory and spawning habits of its own. The anadromous fish use the fresh water of the Cowlitz River for spawning purposes and early rearing of the [fol. 13I] young, the greater portion of their growth and life being associated with the sea. Most of the anadromous fingerlings migrate to sea during the spring of the year. The effect of man-made changes and of pollution on the fish has been adverse to some degree. The reduction of pollution through increase in low water flow, as proposed by the applicant, should be beneficial.

The Examiner made certain findings as to the gross and net values of the fish using the Cowlitz River, and while there may be some question as to the actual values, we are

adopting his findings for the purpose of our analysis, since the values which he adopted appear to be ample. Although the values assigned to the recreational aspects of the fishing may be in part conjectural, the commercial fishing values have a fairly substantial foundation. In any event, we are convinced that the Cowlitz is an important fishery stream in the Columbia River system and our inquiry into the possibility of loss of any portion of these natural resources has been upon the assumption that whatever the actual values may be, they are of material importance to the people of the area and should not be lightly brushed aside.

Although the sports fishery, constituting a form of recreation has been evaluated in monetary terms, a suggestion has been made that it may in addition have substantial intangible values. The fact that such recreation may have intangible values does not mean that they are large or significant and there is no basis for assuming that they outweigh the rather tangible and large flood control, navigation and power benefits which can result from the improvements proposed. In this particular region, as in many other sections of Washington and Oregon, there are many recreation areas of the sports fishery type and we are not faced [fol. 13J] with a unique situation as was the case when we required a substantial power loss at a Kern River dam in California in order to provide recreational advantages which could not otherwise be obtained. Therefore, there is no substantial basis for holding that the sports fishery in the upper Cowlitz has any significant intangible recreational values. Furthermore, the proposed reservoirs undoubtedly will offer other types of recreational opportunities similar to those afforded at other large reservoir projects in other streams, so that there should not be a total loss of recreational values as apparently suggested.

There would not be too much of an anadromous fishery problem at these and similar dams if means could be found for passing the adult migrants upstream and the fingerlings downstream. To get the adult fish by the dams for spawning in the upstream areas, the City proposes to construct fish ladders and also to provide trapping and hauling facilities, so that they may reach natural spawning grounds.

As a complement to the other fish protection measures, both as related to upstream and downstream migrations, the City proposes to construct and operate extensive fish hatchery facilities for artificial propagation of the fish and development of fingerlings capable of making the migrations to the sea.

The testimony does not show that fish ladders of the heights proposed, 185 feet of ascent in one case and 325 feet in the other, would be fully effective, and of course no one can tell until a test has been made and actual conditions studied. Also details of construction must be worked out, such as entrance ways and attraction water for the fish ladder, the use of resting pools and the design of adequate means to pass the fish into the Mossyrock reservoir at different elevations of water. However, in this respect, [fol. 13K] as in connection with the other fish protective measures proposed, the details have yet to be worked out. With suitable design to permit a wide range of operating variations to meet situations reasonably to be anticipated, there would be provided here a full-scale laboratory for research and experimentation by means of which the answers to many perplexing problems of fish protection and propagation can be obtained. The recommendation of the Examiner for denial of the license until the City completes further experimentation at its own expense does not appear to offer a practical solution to the problem, especially when there would be no assurance that the City would be given final authorization without many years of further study. Also, this recommendation would seem to rest upon the assumption that none of the measures proposed at this time would be of material assistance in saving the fish runs, an assumption which is not supported by the record.

It has been asserted that by the time satisfactory evidence can be obtained as to the success of the fishery conservation facilities proposed by applicant, the fishery resources may well be reduced to insignificance. Being cognizant of this possibility, we propose that the hatchery facilities be provided soon enough to assure initially maintenance of a sizable seed stock and later to complement the natural productivity above the dams. The use of fish hatcheries has been particularly successful in connection with runs of

fall chinook and silver salmon, which constitute about 70 per cent of the total commercial fish and about 60 per cent in value of the commercial and sport fish. Furthermore, a substantial portion of the $20 million proposed for Federal expenditure in the Columbia River fisheries plan, probably almost half of the total sum, is to be spent for construction of fish hatcheries and related facilities. This would seem to [fol. 13L] be an endorsement of this method of preserving anadromous fish and an indication that it should be used on the Cowlitz River.

Regardless of the details of the methods used, the record shows that adult anadromous fish are now being passed upstream by high dams successfully and that by trapping and hauling on the Cowlitz similar fish could be taken past the proposed dams reasonably satisfactorily.

While there are several biological and engineering problems to be studied in connection with the ladder system, the record clearly does not support a rejection of the proposals at this time. We recognize that the problems will differ in several details during the construction period and after the dams are placed in operation, and the best solutions must be decided upon for each period. Studies of these problems should go forward promptly and we expect the City either to employ its own biologist or to make suitable arrangements with the State of Washington for expert assistance in exploring all possible means of working out the details of this and other problems dealing with the fishery conservation facilities.

It is when we come to the facilities proposed by the City for passing fingerlings downstream past or through the dams that the novelty of the proposal is evident. After spawning in the headwaters the adult salmon perish. The fry fish which come from eggs remain in the fresh water for several months, sometimes as long as two years, before beginning their migration downstream to salt water where their principal growth takes place. At the time of their downstream passage these fingerlings are seldom over six inches in length and the problem on streams and rivers having dams has been to provide for their passage without injury or substantial loss. Up to the present time there have been no constructive proposals for passing fingerlings

[fol. 13M] downstream past dams. Usually the fingerlings make their way over spillways or through turbines and in each case there are losses.

To solve this problem in a new and untried manner, the City proposes to incorporate a system of passageways and chambers in the upper Mossyrock dam to which the fingerlings will be attracted and through which they will pass. The downstream fish passing system for the lower Mayfield dam will be much more simple as the reservoir behind it will not have a substantial fluctuation. The turbine intakes at Mossyrock and Mayfield dams would be screened off to prevent entry of any fish.

At Mossyrock dam a series of entries or ports would be provided in the upstream face of the dam through which the fish would enter a trunk passageway to a large tank and thence through other passageways being gradually passed through the dam and released at a proper point downstream. As the flows at the penstock intakes would be only about 3,300 c.f.s. spread over a 28-foot opening, there would be a low velocity of approach and therefore the problem of screening should not be difficult of solution. If the fingerlings can be induced to enter the ports along the upstream face of Mossyrock dam, the problems of pressure and movement through the dams would be largely engineering. It is clear from the record that many details of the downstream passing facilities are yet to be worked out.

[fol. 13N] CONCLUSION

From our analysis of the evidence in the record and the arguments advanced on both sides we have reached the conclusion that a fair and reasonable balance can be struck. Probably not all of the present fishery values could be salvaged if the proposed dams are constructed, but certainly not all of those values would be lost as the interveners seem to contend.

We are required to consider all of the possible advantages and disadvantages of the City's proposal from the standpoint of the greatest public benefit through the use of these valuable water and other natural resources. The question posed does not appear to us to be between all power and no fish but rather between large power benefits (needed particularly for defense purposes), important

flood control benefits and navigation benefits, with incidental recreation and intangible benefits, balanced against some fish losses, or a retention of the stream in its present natural condition until such time in the fairly near future when economic pressures will force its full utilization. With proper testing and experimentation by the City of Tacoma, in cooperation with interested State and Federal agencies, [fol. 130] a fishery protective program can be evolved which will prevent undue loss of fishery values in relation to the other values. For these reasons we are issuing the license with certain conditions which are set forth in our accompanying order.

Thomas C. Buchanan, Acting Chairman
Claude L. Draper, Commissioner
Nelson Lee Smith, Commissioner
Harrington Wimberly, Commissioner

Dated at Washington, D. C.,
this 27th day of November, 1951.

Leon M. Fuquay, Secretary.

Date of Issuance: November 28, 1951

[fol. 13P] EXHIBIT "D" TO COMPLAINT

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Thomas C. Buchanan, Acting Chairman; Claude L. Draper, Nelson Lee Smith and Harrington Wimberly.

November 27, 1951

In the Matter of)
) Project No. 2016
City of Tacoma, Washington.)

ORDER ISSUING LICENSE (MAJOR)

Application was filed on December 28, 1948, and later supplemented, by the City of Tacoma, Washington, for a license under the Federal Power Act for a proposed hydro-

electric development, designated as Project No. 2016, to be located on the Cowlitz River in Lewis County, Washington.

A public hearing on the application was held in Washington, D.C., commencing on November 2, 1950, before an Examiner of the Commission, in which hearing all parties, including the Applicant and the Staff of the Commission, as well as two agencies of the State of Washington, the Attorney General of the State of Washington, and the Washington State Sportsmen's Council, Inc. participated, and presented testimony and documentary exhibits. In addition, the Commission itself held a portion of the hearing in Tacoma, Washington, at which all persons desiring to speak either in favor of or in opposition to the issuance of a license for the proposed project were heard. After the close of the hearing, briefs were filed by the various parties and by the Staff and a recommended decision was rendered by the Presiding Examiner containing findings and conclusions. On October 31, 1951, the Commission heard oral argument on exceptions to the Examiner's recommended decision.

For the reasons set forth in Opinion No. 221, adopted this date and made a part hereof by reference, and upon consideration of the entire record in this matter, including the reports of the Federal agencies, protests from interested citizens, the briefs of the parties filed in connection therewith, the Examiner's recommended decision and the oral argument thereon, the Commission *finds*:

(1) As previously found by the Commission, construction and operation of the two dams and reservoirs comprising proposed Project No. 2016 will affect lands of the United States; and could be so oper- [fol. 13Q] ated as to materially affect the navigable capacity of the Cowlitz River below the site of the proposed projects; and either or both of the reservoirs will affect the interests of interstate or foreign commerce.

(2) The project proposed by the Applicant will consist of two dams and appurtenant reservoirs named Mossyrock and Mayfield, respectively, located on the Cowlitz River in the State of Washington. Mossy-

rock, with a usable reservoir storage capacity of 824,000 acre-feet, will have an initial installed capacity of 225,000 kilowatts and an ultimate installed capacity of 300,000 kilowatts. Mayfield will have a usable reservoir storage capacity of 21,000 acre-feet, an initial installed capacity of 120,000 kilowatts, and an ultimate installed capacity of 160,000 kilowatts.

(3) The project proposed by the Applicant will have initially a plant capability varying from 345,000 kilowatts at full head to about 270,000 kilowatts, depending upon the amount of drawdown. The average dependable capacity over a 50-year period will be 275,000 kilowatts. The average annual energy output will be about 1400 million kilowatt-hours. Because of the diversity in stream flow and the large storage capacity which will be provided in the Mossyrock reservoir, a like amount of energy will also be available during a year of most adverse stream flow on the systems of the cities of Tacoma and Seattle, or on the systems of the Northwest Region.

(4) During the months of October through the following May all or a part of up to 260,000 acre-feet of the storage capacity of the Mossyrock reservoir will be reserved for temporary storage of flood waters and in most water years additional storage capacity will be available for the storage of flood waters under the plan of operation.

(5) Operation of the project in the interest of flood control will be equivalent to reducing the flood of record (December 1933) on the Cowlitz River (should it re-occur) from 140,000 cubic feet per second at Castle Rock, Washington, to 70,000 cubic feet per second (bank full capacity) at Castle Rock.

(6) Water traffic on the Cowlitz River is presently confined largely to the lower six or seven miles of its length, but the river may be navigated for some miles upstream.

(7) The project will be operated so as to increase the average minimum flow in the river between Toledo and Castle Rock, Washington, from about 1,000 cubic feet per second to 2,000 cubic feet per second with the resulting 6-inch increase in navigable depths over the shoals in the river between those two places.

(8) The two proposed reservoirs will be easily accessible by a state highway and will offer substantial recreational opportunities to people from local and distant areas.

[fol. 13R] (9) The future peak loads for the systems of the cities of Tacoma and Seattle will probably increase annually by at least 40,000 kilowatts and the energy requirements will probably increase annually by at least 200 million kilowatt-hours. These probable annual increases in peak load and energy requirements do not include additional load and energy to be required as the result of defense activities.

(10) The dependable capacity of the hydroelectric power plants of the Tacoma and Seattle systems, including the addition of new hydroelectric capacity presently planned or being installed, but exclusive of the Cowlitz project, is 700,000 kilowatts when used to serve a combined power load of 1,165,000 kilowatts. The dependable capacity is somewhat less when used to serve combined loads of smaller magnitude. This 700,000 kilowatts of dependable hydroelectric capacity will not be sufficient to serve estimated system load of Tacoma and Seattle beyond 1953.

(11) The Northwest Region has been deficient in dependable capacity to supply the area loads for 1946 to 1949 and during those years the amount of load actually carried was in excess of dependable capacity because the river flows were in excess of those experienced during the period of the most adverse stream flow. In addition, some loads were carried on an interruptible basis.

(12) During the winters of 1947-1948 and 1948-1949 a shortage of power supply occurred in the Northwest Region, resulting in curtailment of load. Only because exceptionally good water conditions existed during the winter of 1949-1950 was it possible to escape serious curtailment of loads during that period.

(13) There have been restrictions on the additions of new loads on the electric systems of the Northwest Region prior to the advent of the national emergency and the power shortage is even more serious at the present time in spite of the speed-up efforts being made by the agencies of the Federal Government and others to provide additional power supply as quickly as possible.

(14) The actual loads in the Northwest Region have been exceeding estimated loads for the present water year 1950-51.

(15) The existing power shortage in the Northwest Region is more acute in the area on the west side of the Cascade Mountains, including the Puget Sound area, than it is on the eastern slopes of the Cascades.

(16) In recent years the Federal Government has provided the major portion of new power supply provided in the Northwest Region. The various Federal schedules known as "Advance Programs" show that the estimated time when new generating units would be placed in operation in the Columbia River basin have not been met.

[fol. 13S] (17) Because of the time lag which has developed between growth or requirement for power and construction of power supply facilities, there will not be firm power available to supply full potential loads until after 1958 and interim power supply for some new industrial loads will necessarily be sold on an interruptible basis.

(18) At the present time, during the national emergency, steps are being taken to provide as much new power supply as possible to meet the new defense electric loads. A tentative so-called "speed-up program" of construction of new power supply has been prepared by the Bonneville Power Administration and others for the primary purpose of obtaining additional power supply for defense loads. This program is in final form and further authorization and funds must be obtained from Congress before the program can be completed.

(19) If a critical water year should occur in the winter season of 1950-51 there would be a 425,000-kilowatt average power shortage in the Northwest Region of which only 125,000-kilowatts would be interruptible load.

(20) Based on estimated future loads for the Northwest Region and the estimated power supply that is to be provided to supply such loads, there will be a deficiency of dependable capacity in the Northwest Region until about 1960, at which time there should be just about sufficient capacity for load and for adequate reserves. Without the addition of new defense loads, the deficiency in dependable capacity in 1955 will be about 430,000-kilowatts, and there could be a deficiency in plant capability of as much as 870,000-kilowatts. Should an adverse water year be experienced prior to the year 1954, it would be necessary to curtail seriously the general service load of the Northwest Region.

(21) As the Northwest Region will continue to be deficient in power supply for approximately the next ten years, only such new loads can be taken on as can be supplied by development of new power sources.

(22) There will be a power market available for the type of power that could be produced by the Cowlitz Project as soon as that output would be made available and there will also be a market for all other

new sources of power that might be developed under existing plans. Because of its size, location and characteristics of power output, the Cowlitz Project will be an exceptionally valuable addition to the Northwest Region power supply and, will relieve to some extent the power shortage which may continue for almost a decade.

(23) Annual peak power demand in the Northwest Region occurs during the period when the flow of water in the main stem of the Columbia River is low. As the flow of the Cowlitz is high at the time [fol. 13T] the flow of the Columbia is low, the Cowlitz Project output could fit into and be of material advantage to the coordinated operation and permit utilization of this diversity in stream flow to supply a large block of power at the time of regional system peak loads. The addition of 345,000-kilowatts of installed capacity which could be provided initially by the Cowlitz Project, if made within three years, would assist greatly in alleviating the power shortage in the Northwest Region and because the project would be located in western Washington, a displacement of power flows from the eastern portion of the Bonneville system into the Tacoma-Seattle-Portland area would result in a reduction in transmission line losses. Further, the Cowlitz River Project will improve the flexibility of the Northwest Power Pool by making available more synchronizing power west of the Cascade Mountains.

(24) By adding from 270,000 kilowatts to 345,000 kilowatts of new capacity, the Cowlitz Project will reduce substantially the amount of "load-shedding" in the Tacoma-Seattle area that now occurs when operating troubles develop on the system of the Northwest Power Pool.

(25) During the flood periods on the Columbia River the Cowlitz Project could offer substantial power assistance to the Portland area.

(26) On the basis of the evidence in this record, none of the hydroelectric projects suggested for construction in lieu of the Cowlitz Project can be constructed as quickly or as economically as the Cowlitz Project.

(27) The Applicant has a preference, under the law, over private utilities in the purchase of power from Bonneville Power Administration.

(28) The only new sources of power supply in substantial quantities that could be constructed by the Applicant and placed on the line by 1954 consist of the proposed Cowlitz Project and new steam electric plants.

(29) The cost of the proposed project will be about $135 million exclusive of any required fish handling facilities.

(30) The estimated cost of the fish handling facilities presently proposed by the Applicant for construction as a part of the proposed project is $7,100,000.

(31) The annual value of Cowlitz power will exceed the annual cost of producing that power by at least $1,700,000 based on an interest rate of 2 percent.

(32) Although no monetary value has been assigned to the flood control or navigation benefits which could be provided by the project, the former benefits will be substantial and the navigation benefits will be direct and of increasing usefulness.

[fol. 13U] (33) For an average cost of money of 2.5% for 42 years or 2.75% for 38 years, the ratio of gross earnings to debt service requirements would be 1.5 under the existing rate schedules of the Applicant with a minimum realization of 6 mills per kilowatt-hour, and a debt of $135 million could be financed by the City of Tacoma system at a satisfactory average money cost. If the Cowlitz Project cost were $142 million rather than $135 million, the debt could also be retired in reasonable time.

(34) The project as proposed by the Applicant will utilize to the maximum feasible extent all of the fall and the flow of the Cowlitz River throughout the reach of the river to be developed and the available water resources in the reach of the Cowlitz River involved for power, navigation and flood control purposes.

(35) The project, if constructed according to the plans submitted by the Applicant, will be safe and adequate to develop the available water resources at the two sites for power purposes and the plans for the power features of the project conform with accepted engineering practices.

(36) Proposals by the U. S. Fish and Wildlife Service for the improvement of spawning conditions and an increase of the salmon runs into tributaries to the lower Columbia River have been expanded and formalized by the Fish and Wildlife Service in the Lower Columbia River Fishery Plan. The purpose of the plan is to conserve, rehabilitate and enhance the fishery resources of the Columbia Basin, and the plan was devised to offset effects caused by constructed and proposed dams in the Columbia River Basin.

(37) The Lower Columbia River Fishery Plan was conceived around 1945. In 1946 Congress provided legislation which enabled the States to be brought directly into the program, and on June 23, 1948, the Fish and Game Commissions of the States of Washington, Oregon, and Idaho entered into an agreement with the Fish and Wildlife Service outlining the areas of authority of the States and the services and duties of each under this fisheries program. The program generally is to be performed by the States under the agreement, with funds appropriated by Congress in the annual appropriation made to the Army Engineers to carry out its civil functions, and these funds are then transferred by the Army to the Fish and Wildlife Service.

(38) While Congress has not specifically approved or adopted the $20,000,000 Lower Columbia River Fishery Plan, it specifically authorized and appropriated funds in the fiscal years of 1949, 1950 and 1951 to be used for specific facilities included in the Plan.

(39) Both the U. S. Bureau of Reclamation and the Army Engineers have subscribed t[o] the objectives of the Lower Columbia River Fishery Program and to its completion by the Fish and Wildlife Service as [fol. 13V] rapidly as funds will permit. The Army Engineers in the comprehensive basin plan included in the "Review Report on Columbia River and Tributaries" have given full approval to this program, and have recommended that development of the basin be so scheduled as to permit the full implementation of the program. The Board of Engineers for Rivers and Harbors have recommended that the fishery program be advanced, and the Chief of Engineers in his letter transmitting the Review Report to the Secretary of the Army for submission to the Congress recommended that Congress give favorable consideratio... to the Lower Columbia River Fisheries Plan.

(40) While there are several problems which require both engineering and biological study in connection with the fish ladder system proposed for passing upstream migrants over the proposed dams before adoption of a final design, the present data in the record is promising enough in prospect as to not support a rejection of such a ladder system at this time. The alternative method of trapping and hauling upstream migrants past the dams should produce reasonably satisfactory results.

(41) While the record does not show conclusively whether certain features of the facilities proposed for passing downstream migrants would be adequate to prevent excessive losses, the record does indicate that with proper testing and experimentation it

should be possible to provide fish handling facilities of the type proposed which will prevent undue losses of downstream migrants. Further tests and experimentation should be made before any permanent features of the fish handling facilities for downstream migrants are constructed.

(42) While the Applicant has proposed conservation practices, facilities and improvements for conservation of the fishery resources of the Cowlitz River watershed in addition to the facilities proposed for installation at or in the dams, such proposals and the effect thereof are not sufficiently detailed in the record to permit an adequate appraisal of their effectiveness. However, they show enough promise to justify the carrying through of more detailed studies and plans.

(43) On the Cowlitz River watershed the total annual gross value due to all fish, regardless of species, attributable to the area above Mayfield, is roughly equal to that below Mayfield, in each case being about one million dollars.

(44) The annual net dollar value due to the fish attributable to the area above Mayfield is about equal to that below Mayfield, and in each case that value may be considered roughly as being approximately $600,000. The annual net value due to fish, exclusive of recreational values derived from the sportsmen's catch, is estimated to be about $515,000 above Mayfield and about $445,000 below Mayfield.

[fol. 13W] (45) The annual net recreational dollar value of the sportsmen's catch of anadromous fish attributable to the Cowlitz River system above Mayfield is estimated to be about $76,000 which is one-half the estimated gross recreational fish value. The annual net recreational dollar value which would be provided by the Mayfield and Mossyrock reservoirs would offset, to an extent which cannot be now determined, the loss of recreational value occasioned by the construction of the project.

(46) The annual net recreational value of the sportsmen's catch of anadromous fish attributable to the Cowlitz River basin below Mayfield is estimated to be about $136,000.

(47) The investment cost of facilities and improvements for the Applicant's fishery resources program, if permitted to proceed under license, would be at least $9,465,000. Using this estimated cost, which has been derived by the Staff, the annual cost of operating and maintaining facilities and improvements plus the fixed charges on the investment may be estimated at $610,000.

(48) The record does not show that construction, maintenance and reasonable operation of the Cowlitz Project would have any substantial adverse effect on the fishery resource below the Mayfield site, and there are indications that conditions downstream will be improved somewhat when the project is constructed.

(49) If it is assumed that there would be no measurable loss of the fishery resources of the Cowlitz River system resulting from the construction, operation and maintenance of the proposed project, the annual net benefits of the proposed project, exclusive of navigation and flood control benefits, would be $1,090,000 ($1,700,000 power value less $610,000 fish facilities operating cost).

(50) If it is assumed that one-half of the fishery resources above Mayfield is saved after construction of the proposed project, the annual net benefits of the project, exclusive of navigation and flood control benefits, would be $790,000 ($1,700,000 power value less $610,000 fish facilities operating cost less $300,000 fish loss).

(51) Even if no fish were saved above Mayfield after construction of the proposed project, the annual net benefits of the project exclusive of navigation and flood control would be $499,033 ($1,700,000 power value less $610,000 fish facilities operating cost less $590,967 fish loss).

(52) Based on cost data in the record and on estimates made to approximate other costs, the Cowlitz Project would be financially and economically feasible if constructed in accordance with the plans as presently submitted.

[fol. 13X] (53) The Applicant is a municipal corporation; it has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project; and it is a municipality within the meaning of Section 3 (7) of the Act.

(54) The Applicant has submitted satisfactory evidence of its ability to finance and carry to completion the project described in the application, with such modifications as may be found to be appropriate.

(55) No conflicting application is before the Commission. Due public notice has been given.

(56) The proposed project will not affect any Government dam, nor will the issuance of a license therefor as hereinafter provided affect the development of any water resources for public purposes which should be undertaken by the United States.

(57) The issuance of a license for the project will not interfere or be inconsistent with the purposes for which any reservation or withdrawal of public lands were created or acquired.

(58) The ultimate installed horsepower capacity of the project hereinafter authorized is 474,000 horsepower and the energy generated thereby will be sold or used by the Licensee.

(59) Under present circumstances and conditions and upon the terms and conditions hereinafter included in the license, the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife re-

sources, and for other beneficial public uses including recreational purposes.

(60) The amount of annual charges to be paid under the license for the purpose of reimbursing the United States for the costs of administration of Part I of the Act is reasonable as hereinafter fixed and specified, and the amount of annual charges to be paid under the license for the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands, including transmission line right-of-way, should be later determined.

(61) In accordance with Section 10 (d) of the Act the rate of return upon the net investment in the project and the proportion of surplus earnings to be paid into and held in amortization reserves are reasonable as hereinafter specified.

[fol. 13Y] (62) The exhibits described and designated below, filed as part of the application for license as supplemented, conform to the Commission's rules and regulations and should be approved as part of the license for the project.

(63) The proposed project will consist of two developments, namely, Mossyrock and Mayfield, as follows:

(a) The Mossyrock development will be located on the Cowlitz River at about mile 65 and will consist of a concrete gravity dam or other suitable type of dam as may be determined by further investigation and design. The dam will be about 510 feet maximum height above bedrock and about 1300 feet in length at its crest and contain an ogee type spillway surmounted by 5 taintor gates.

The reservoir will extend approximately 21 miles upstream and have an area of about 10,000 acres with normal water surface at elevation 750 feet, a gross storage capacity of about 1,372,000 acre-feet, and a usable storage capacity of about 824,000 acre-feet with a 100-foot

draw-down; a powerhouse built integral with the toe of the non-overflow section of the dam as a foundation, with initial installation comprising three 75,000-kilowatt units, making a total capacity of 309,000 horsepower or 225,000 kilowatts operating under a gross head which would vary from 325 to 225 feet. Provision is to be made for a fourth additional unit of 75,000 kilowatts. A step-up substation will be installed adjacent to the powerhouse. The Mossyrock development will provide flood-control storage as desired by the Chief of Engineers, Department of the Army.

(b) The Mayfield development will be located on the Cowlitz River at about mile 52 and will consist of a concrete dam composed of a small arch section across the narrow river gorge, an ogee gravity spillway section surmounted by 5 taintor gates, and 2 gravity abutment sections, the dam to have a maximum height of about 240 feet above bedrock and a length of about 850 feet at its crest; a reservoir extending approximately 13.5 miles upstream to the Mossyrock dam with an area of about 2,200 acres with normal water surface at elevation 425 feet, a gross storage capacity of about 127,000 acre-feet and a usable storage capacity of about 21,000 acre-feet with a 10-foot draw-down; a tunnel about 880 feet long, with associated concrete head works, fish screens, forebay, gate house, and steel penstocks leading to the Mayfield powerhouse; a powerhouse with initial installation comprising three 40,000-kilowatt units making a total capacity of 120,000 kilowatts, or 165,000 horsepower, operating under a gross head which [Vol. 13Z] would vary from 185 to 175 feet. Provision is to be made for a fourth unit of 40,000 kilowatts. A step-up substation will be installed adjacent to the powerhouse. Double circuit 230-kilovolt transmission lines on steel

towers will connect the two powerhouses and extend to the Cowlitz substation on the outskirts of Tacoma. These lines will have an aggregate length of about 60 miles.

(c) Such fish ladders, fish traps or other fish handling facilities or fish protective devices as may be hereafter approved by the Commission upon the recommendation of the Secretary of the Interior.

(d) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by applicant or by the United States; such project area and project boundary being more specifically shown and described by certain exhibits which formed part of the application for license and which are designated and described as follows:

Exhibit J: Drawings in two sheets, Sheet 1 signed by C. A. Erdahl, Acting Mayor and Commissioner of Public Utilities, December 24, 1948, and Sheet 4 signed by C. V. Fawcett, Mayor, and approved by C. A. Erdahl, Commissioner of Public Utilities, June 15, 1949 and comprising:

Sheet 1 (FPC No. 2016-1) entitled "Location Map";

Sheet 2 (FPC No. 2016-4) entitled "General Project Map."

(e) The principal structures referred to above, the location, nature and character of which are more specifically shown by the exhibits hereinbefore cited and by certain other exhibits

which also formed part of the application for license and which are designated and described as follows:

Exhibit L: Drawings in 13 sheets, signed by C. V. Fawcett, Mayor, and approved by C. A. Erdahl, Commissioner of Public Utilities, Sheet 1 on December 24, 1948 and the other sheets on June 15, 1949, and comprising:

Sheet 1 (FPC No. 2016-2) entitled "Mayfield Dam, General Plan";

Sheet 3 (FPC No. 2016-5) entitled "Mayfield Dam, Arch and Thrust Blocks, Plan and Sections";

[fol. 13AA] Sheet 4 (FPC No. 2016-6) entitled "Mayfield Dam, Cross Sections Thru Spillway";

Sheet 5 (FPC No. 2016-7) entitled "Mayfield Powerhouse, Plans and Sections";

Sheet 6 (FPC No. 2016-8) entitled "Mayfield Powerhouse and Intake, Typical Section";

Sheet 7 (FPC No. 2016-9) entitled "Mayfield, One Line Diagram";

Sheet 8 (FPC No. 2016-10) entitled "Mayfield Switchyard, General Plan";

Sheet 11 (FPC No. 2016-13) entitled "Mossyrock Powerhouse, Plans and Sections";

Sheet 12 (FPC No. 2016-14) entitled "Mossyrock Powerhouse, Typical Cross Section and Elevation";

Sheet 13 (FPC No. 2016-15) entitled "Mossyrock One Line Diagram";

Sheet 14 (FPC No. 2016-16) entitled "Mossyrock Switchyard, General Plan";

Sheet 9 (FPC No. 2016-17) entitled "Mossyrock Dam, Plan and Section"; and

Sheet 3 (FPC No. 2016-18) entitled "Mossyrock Dam, Spillway Section."

Exhibit M: A statement in four sheets entitled "General Description and General Specifications of Proposed Mechanical, Electrical and Transmission Equipment for the Project" and filed June 20, 1949.

(f) All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as a part of the project is approved or acquiesced in by the Commission; also all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance and operation of the project.

(65) The Secretary of the Army and the Chief of Engineers have approved the project plans insofar as they affect the interests of navigation and flood control, upon the license conditions hereinafter provided for the protection of such interests.

(66) The Secretary of the Interior reported that he was hopeful that with proper effort and study the fish

problem could be solved and recommended stipulations for the protection of fishlife. The substance of his recommendations has been included, with the exception of a requirement limiting the fish protective devices to those approved by State agencies, a limitation which does not appear appropriate in a Federal license.

[fol. 13BB] The Commission *orders*:

(A) This license is issued to the City of Tacoma, Washington, under Section 4 (e) of the Act for a period of 50 years, effective as of the first day of the month in which the accepted license is filed with the Commission by the Licensee, for the construction, operation and maintenance of Project No. 2016 upon the Cowlitz River, a stream over which Congress has jurisdiction, and upon lands of the United States, subject to the terms and conditions of the Act which is incorporated by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) This license is also subject to the terms and conditions set forth in Form L-6 entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States", which terms and conditions are attached hereto and made a part hereof; and subject to the following special conditions set forth herein as additional articles:

Article 28. The Licensee shall commence construction of project within two years of the effective date of this license; shall thereafter in good faith and with due diligence prosecute such construction; and shall complete the project works in 36 months.

Article 29. The Licensee shall prior to flooding clear all lands in the bottoms and margin of the reservoir up to high water level, and shall dispose of all temporary structures, unused timber, brush, refuse, or inflammable material resulting

from the clearing of the lands or from the construction and maintenance of the project works. In addition, all trees along the margin of the reservoir which may die during the operation of the project shall be removed. The clearing of the lands and the disposal of the material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission.

Article 30. Before beginning the construction of any permanent fish ladders, fish traps or other fish handling facilities or fish protective devices, the Licensee shall make further studies, tests and experiments to determine the probable effectiveness of such facilities and devices and shall submit plans therefor and obtain Commission approval. In making such studies, tests and experiments and in the preparation of final design plans, the Licensee shall cooperate with the United States Fish and Wildlife Service and the Departments of Fisheries and Game of the State of Washington. The Licensee shall continue its studies and investigations with respect to its proposed program of stream improvement and hatchery facilities. The Licensee shall sub- [fol. 13CC] mit quarterly reports to the Commission of its activities hereunder.

Article 31. The Licensee shall construct, maintain and operate such fish ladders, fish traps or other fish handling facilities or fish protective devices and make such stream improvements and provide such fish hatcheries and similar facilities and comply with such reasonable modifications of the project structures and operation in the interest of fish as may be prescribed hereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior.

Article 32. The Licensee shall pay the United States the following annual charges for the pur-

pose of reimbursing it for the costs of administration of Part I of the Act; One (1) cent per horsepower on the authorized installed capacity (474,000 horsepower), plus two and one-half (2½) cents per 1,000 kilowatt-hours of gross energy generated by the project during the calendar year for which the charge is made. The Licensee shall also pay to the United States such charges as may be specified hereafter for the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands, including transmission line right-of-way.

Article 33. The Licensee shall, within two years of the effective date of this license, file Exhibits F and K in accordance with the rules and regulations of the Commission.

Article 34. During the months of October through May flood storage space reservation in Mossyrock Reservoir corresponding to reservoir level elevation 750, full reservoir, on 1 October, decreasing uniformly to elevation 723 on 1 December, remaining constant at elevation 723 from 1 December to 1 February, increasing uniformly from elevation 723 on 1 February to elevation 745 on 1 May and reaching elevation 750 no sooner than 1 June, shall be kept available for the temporary storage of flood water. During floods the gates shall be operated, in conjunction with the operation of the Mayfield Reservoir, so as not to exceed a flow of 70,000 cfs (bank full capacity) at Castle Rock, Washington, until the reservoir storage, if exceeding the specified reservation, has been decreased to the specified reservation.

Article 35. In the interest of navigation:

(a) The minimum release of water at the Mayfield plant shall be 2,000 cubic feet per second; and

[fol. 13DD] (b) The rates of change of release of water from the Mayfield plan shall not

exceed that which will cause a change of water level at the City of Castle Rock, Washington, of one foot per hour, either up or down.

(C) The exhibits specified in paragraph (63) above are approved as part of this license.

(D) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed within the 30-day period provided by Section 313 (a) of the Act.

(E) This license shall be accepted and returned to the Commission within 60 days from date of issuance of this order.

By the Commission.

Leon M. Fuquay,
Secretary.

Date of Issuance: November 28, 1951

Reproduced by Tacoma City Light.

[fol. 13EE] In Testimony of Acceptance of all the provisions, terms, and conditions of this license, City of Tacoma, Washington, this ..... day of ....., 19...., has caused its name to be signed hereto by ...., its ..... Mayor, and its corporate seal to be affixed hereto and attested by ....., its ..... City Clerk, pursuant to a resolution of its City Council duly passed on the ..... day of ...., 19...., a certified copy of the record of which is attached hereto.

City of Tacoma, Washington

By .....
Mayor

Attest:

.....
City Clerk

(Executed in quadruplicate)

[fol. 14] EXHIBIT "E" TO COMPLAINT

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Thomas C. Buchanan, Chairman; Claude L. Draper, Nelson Lee Smith and Harrington Wimberly.

January 22, 1952

In the Matter of)
) Project No. 2016
City of Tacoma, Washington)

ORDER DENYING APPLICATION FOR REHEARING

On December 26, 1951 the Department of Fisheries and the Department of Game of the State of Washington, and the Washington State Sportsmen's Council Inc., all being Interveners, filed an application for rehearing on the Commission's Opinion No. 281 and accompanying order issued November 28, 1951 in the above-designated matter.

The order issued a license to the City of Tacoma, Washington, pursuant to the Federal Power Act, authorizing the City to construct, operate and maintain a water power project on the Cowlitz River, Washington, commonly known as the Cowlitz Project. The license authorizes two dams and associated electric generating and other facilities, the Mayfield dam to be located at about river mile 52 and the Mossyrock dam at about river mile 65. In addition, the license provides that the Licensee shall construct, operate and maintain such fish ladders, fish traps or other fish handling facilities or fish protective devices and make such stream improvements and provide such fish hatcheries and similar facilities and comply with such reasonable modifications of the project structures and operation in the interest of fish as may be prescribed by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior. Furthermore, the Licensee is required, before commencing construction of any permanent fish facilities, to make further studies, tests and experiments to determine the probable effectiveness of such facilities and to submit plans therefor and obtain Commission ap-

proval. The license also requires the Licensee to cooperate with the United States Fish and Wildlife Service and the State of Washington Departments of Fisheries and Game in carrying out such studies, experiments and tests.

[fol. 15] The Interveners appear to be under the impression that the Commission failed to consider the proposed Cowlitz Project in relation to the Columbia Basin as a whole. As shown by the numerous specific findings in the opinion and order issued November 28, 1951, the Commission considered and analyzed the evidence as related specifically to the Cowlitz Project alone and as related to the comprehensive development of the entire Columbia River Basin. It was only after the Commission had examined all the plans in evidence relating to the comprehensive development of the Pacific Northwest Region that it reached the conclusion that the Cowlitz Project was best adapted to a comprehensive plan for developing the Columbia River watershed for the use and benefit of interstate commerce and the other beneficial public uses.

The Interveners take exception to the findings with respect to the lack of adequate power supplies in the Pacific Northwest and call attention to newspaper reports of the power requirements and power supply in the area. The Commission cannot rely upon newspaper reports, as suggested by the Interveners, when it has before it so much sound factual evidence dealing with the power situation in great detail. So long as the electric power supply in the area is insufficient to satisfy the power requirements of the area, there will continue to be what has been generally recognized as a power shortage in the area.

Interveners express concern because Articles 30 and 31 of the license do not specifically provide that they be given an opportunity to be heard before the Commission approves the final plans for the fishery facilities. This concern is unfounded. The Act of August 14, 1946 (60 Stat. 1080, 16 U.S.C. 661) requires us to "consult with * * * the head of the agency exercising administration over wildlife resources of the State wherein the impoundment * * * is to be constructed" for the purpose of determining the measures that should be adopted to prevent loss of and damage to wildlife resources (which term is defined as including fishery

resources). Consequently, the Washington State conservation agencies will be consulted when the plans for fishery facilities are submitted for Commission approval and will be given every opportunity to furnish any evidence deemed material and relevant to the plans for conserving the fishery resources of the Cowlitz River.

The Interveners have excepted to many other findings and conclusions and to other provisions of the order, but those exceptions are found to be without merit when considered together with the evidence of record. Likewise, the legal exceptions to the order deal with questions fully argued and considered and do not require further comment.

[fol. 16] The Commission *finds*:

No good reason appears for granting a rehearing on the opinion and order issued November 28, 1951 in this matter.

The Commission *orders*:

The application for rehearing is hereby denied.

By the Commission.

Leon M. Fuquay /s/
Leon M. Fuquay,
Secretary.

Date of Issuance: January 24, 1952

[fol. 17] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR PIERCE COUNTY

[Title omitted]

ORDER APPOINTING TAXPAYERS TO REPRESENT ALL TAXPAYERS —February 8, 1952

This action having regularly come on for hearing this date on plaintiff's application contained in its complaint

herein that the Court name a taxpayer or taxpayers upon whom service of process herein shall be made as the representative of all the taxpayers of the City of Tacoma, Washington, and it appearing to the Court that such application is in order and that such taxpayer or taxpayers should be so named, and that J. Ralph Williams, Robert L. Fox, Chester C. Paulson and E. R. McKee are representative resident taxpayers and electric light and power users of said city, it is

Ordered that said J. Ralph Williams, Robert L. Fox, Chester C. Paulson and E. R. McKee be and they are hereby named as taxpayers to represent all taxpayers of said City of Tacoma in this action, and that service of summons and complaint in this action and of a certified copy of this order be made upon each of said taxpayers as the representatives of all taxpayers of said City.

Dated at Tacoma, Washington, February 8, 1952.

Bartlett Rummel, Judge.

Presented by: Dean Barline, Of Attorneys for Plaintiff.

[fol. 20] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF THURSTON

No. 26572

THE CITY OF TACOMA, a municipal corporation, Plaintiff,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, Defendants.

DEMURRER—Filed March 27, 1952

Come Now, J. Ralph Williams, Robert L. Fox, Chester C. Paulson and E. R. McKee, defendant Taxpayers of the City of Tacoma, and representative of all taxpayers and demur to the complaint of the plaintiff on the following grounds:

1. That there is another cause of action pending between the same parties, or part of the same parties herein;
2. That several causes of action have been improperly united;
3. That the complaint does not state facts sufficient to constitute a cause of action.

Copeland and Tollefson, Attorneys for defendant Tacoma Taxpayers, 814 Rust Building, Tacoma 2, Washington.

Copy received this 10th day of March, 1952.

/s/ Dean Barline, Attorneys for Plaintiff.

[fol. 21] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THURSTON COUNTY

[Title omitted]

AMENDED ANSWER AND CROSS COMPLAINT—Filed May 23, 1952

Come now the defendants, Robert Schoettler as Director of Fisheries, and John A. Biggs, as Director of Game of the State of Washington, and in answer to plaintiff's complaint, admit, deny and allege as follows:

I

Admit paragraphs I, II, III, IV, VI and VIII of plaintiff's complaint.

II

Answering paragraph V of said complaint these defendants specifically deny that the license therein referred to ever did have or now has any legal force and effect. Each and every other allegation of fact contained in said paragraph is hereby admitted.

III

Deny the allegations of paragraph VII of plaintiff's complaint, and particularly deny that Chapter 9 of the Laws of 1949 of the Legislature of the State of Washington is unconstitutional in any respect whatsoever.

For further answer and by way of cross complaint against plaintiff, these defendants complain and allege as follows, to-wit, that:

[fol. 22]

I

The ordinance of the plaintiff, dated January 9, 1952, numbered 14386, alleged in paragraph III of plaintiff's complaint, is invalid and the contemplated construction of the two dams alleged in paragraph IV of plaintiff's complaint pursuant to the aforesaid ordinance is illegal and unlawful for the following grounds and upon the following reasons:

1. No hydraulic permit has been issued to the plaintiff by the Supervisor of Hydraulics of the State of Washington as provided by Section 46, Chapter 122, laws of 1949 (Remington's Revised Statutes 1949 Supp. 5780-320).

2. The plaintiff has not submitted complete plans and specifications for proper protection of fishlife in connection with its contemplated construction of said dams, nor has it secured the approval of the Director of Fisheries or the Director of Game of the State of Washington to said plans and specifications, all as provided by Section 49, Chapter 122, Laws of 1949 (Remington's Revised Statutes 1949 Supp. 5780-323), but plaintiff asserts the right to proceed in accordance with the terms and provisions of the purported license which it alleges in its complaint has been granted by the Federal Power Commission.

3. The location of the two aforesaid contemplated dams is within the anadromous fish sanctuary established and created by the legislature of the state by Sec. 1, Chapter 9, Laws of 1949 (Remington's Revised Statutes 1949 Supp. 5944-2, wherein all dams in excess of 25 feet are prohibited by said law, and these defendants are required to abate the same.

II

If plaintiff is permitted to proceed with the construction of the two aforesaid dams within the anadromous fish [fol. 23] sanctuary as heretofore established as aforesaid by the legislature of this state, the large and extensive anadromous fish runs now present in and utilizing the Cowlitz River will be substantially and permanently impaired or destroyed by said construction and said dams; as against plaintiff's proposed construction of said dams these defendants and the State of Washington do not now have, and will not have in the future, any plain, speedy or adequate remedy at law, all of which is to the irreparable loss, damage and injury of the state and the citizens thereof, both present and future.

III

The anadromous fish runs inhabiting and utilizing the Cowlitz River are the property of all of the people of the State of Washington, and plaintiff, acting under the provisions of the Federal Power Act (16 U. S. C. A. Sec. 791 et seq) or acting under any other federal law or authority, cannot lawfully proceed with the construction of the two aforesaid dams and with the destruction of the anadromous fish runs occasioned by and resulting from such construction in derogation of the laws of the State of Washington and of the rights of the people of said state.

Wherefore, the defendants respectfully pray that the aforementioned Ordinance No. 14386 of the plaintiff be adjudged invalid, illegal and unlawful, and that the plaintiff be perpetually restrained and enjoined from constructing the two dams mentioned in paragraph IV of plaintiff's complaint, and from constructing any other dams or ob-

structions in violation of the laws of this state; and for such other and further relief as to the court may seem just and equitable in the premises.

[fol. 24] /s/ William E. Hicks, Special Asst. Attorney General, State of Washington.
/s/ Lee Olwell, Special Asst. Attorney General, State of Washington.
/s/ Smith Troy, Attorney General, State of Washington.
/s/ Smith Troy, Special Assistant Attorney General, State of Washington.
Attorneys for Defendants Robert Schoettler as Director of Fisheries and John A. Biggs as Director of Game of the State of Washington.

[fol. 26] [File endorsement omitted]

Duly sworn to by John A. Biggs, jurat omitted in printing.

[fol. 27] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

DEMURRER TO AMENDED ANSWER AND CROSS COMPLAINT—Filed June 3, 1952

Comes now the plaintiff above named and demurs to the Amended Answer and Cross Complaint of the defendants, Robert Schoettler, as Director of Fisheries, and John A. Biggs, as Director of Game, of the State of Washington, upon the grounds that the same does not constitute a defense or counter claim or state facts sufficient to constitute a defense to the complaint or entitle said defendants to any relief herein.

/s/ Clarence W. Boyle, Corporation Counsel, /s/ Dean Barline, Assistant Corporation Counsel, /s/ E. K. Murray, Special Counsel, Attorneys for Plaintiff, 300 City Hall, Tacoma 2, Washington.

Acknowledgments of Service (omitted in printing)

[fol. 28] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY.

No. 26572

THE CITY OF TACOMA, a municipal corporation, Plaintiff,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON et al.

MEMORANDUM OPINION—September 18, 1952

This is an action to determine the validity of Chapter 9 of the Laws of 1949, hereinafter to be referred to as "the act." It is contended by plaintiff that the act is unconstitutional for several reasons.

It is urged, inter alia, that the subject matter of the act is not expressed in the title and the act embraces more than one subject. Plaintiff's contention in that regard is not sound. The title proclaims it as an act for the protection of certain fish life in a certain area. To further that purpose the construction of certain dams is prohibited within the designated area. The title need not index each means taken to protect fish life.

It is also urged that the act contains an unlawful delegation of legislative authority. Plaintiff's contention in that regard is not sound. In the recent case of Senior Citizens League, Inc. v. Department of Social Security, 38 Wn (2d) 142 it was said at page 152:

"The constitutional prohibition against the delegation of legislative power does not preclude the delegation to administrative officers or boards of the power to determine some fact or state of things upon

which the application of the law is made to depend, provided the law enunciates a standard by which such officers or boards must be guided." (Cases cited)

The words "the migratory range of *any* anadromous fish" seems to establish a plain standard. It is a matter properly left to administrative fact finding for several reasons, among the more obvious of which are: 1. To attempt, in the act, to set forth the migratory range of fish in each small stream within the designated area would unduely (sic) extend the act; 2. The legislature has no facility for an inspection of the streams to determine the range of migration. The directors have trained personel (sic) to make such determinations and 3. As suggested in plaintiff's brief the migratory range may be subject to change by stream improvements or other means either natural or artificial.

The statute being valid as against the objections heretofore mentioned, there remains the objection that the act invades a field now under exclusive federal domination. The Court does not believe it necessary to pass upon that question.

The state has the undoubted right to limit the powers of its own officers and subdivisions. The plaintiff city is a subordinate subdivision of the state. It was said in State ex rel Hodde v. Superior Court, 140 Dec. 463, "we find that municipal corporations are regarded as subordinate subdivisions of state government". In State v. Aberdeen, 34 Wash 61, it was said: "A municipal corporation is a subordinate subdivision of the state government. It derives its existence, powers, and privileges from the state". The right of the plaintiff city to build any dam anywhere must depend upon a grant of authority from the legislature. The city relies upon such a grant contained in R. R. S. 9488. (R. O. W. 80.40.10) What the legislature can give the legislature can take away. It is said in 19 R. O. L. 730, sections 35 & 36, in this regard:

"So far as a city is concerned, considered in the character of an artificial being, it is a creature of the legislature. It can have no rights save those bestowed upon it by its creator. As it might have been created lacking some right bestowed upon it, it is in no posi-

tion to complain should the power that bestowed such right see fit to take it away. In other words, the power to create implies the power to impose upon the creature such limitations as the creator may will, and to modify or even destroy what has been created. The power to create a municipal corporation, which is vested in the legislature, implies the power to create it with such limitations as the legislature may see fit to impose, and to impose such limitations at any stage of its existance. (sic) A municipal corporation, even if it existed before the state in which it is located became an independent sovereignty, has no powers which [fol. 29] are not derived from and subordinate to those of the state."

Plaintiff contends that this is not an action against the state. That is not material. The rights and powers of plaintiff are given by the state and must be founded upon and only upon the laws of the State of Washington. The act is a valid statement of the public policy of the State of Washington and is binding upon the plaintiff. Defendants must prevail.

Done this the 18th day of September, 1952 A. D.

/s/ Charles T. Wright, Judge.

[File endorsement omitted]

[fol. 30] In the Superior Court of the State of Washington, for Thurston County

[Title omitted]

Order Sustaining Demurrer of Defendants Taxpayers and Dismissing Complaint—December 15, 1952

This matter having regularly come on for argument on June 29, 1952, upon the demurrer of defendants J. Ralph Williams, Robert L. Fox, Chester C. Paulsen and E. R.

McKee, representative taxpayers of Tacoma, Washington, to the complaint herein, and upon the demurrer of the plaintiff to the amended answer and cross complaint of the defendants Robert Schoettler, as Director of Fisheries, and John A. Biggs, as Director of Game, of the State of Washington, plaintiff appearing by Clarence M. Boyle, Corporation Counsel, Dean Barline, Assistant Corporation Counsel, and E. K. Murray, Special Counsel, its attorneys, said defendants Taxpayers of Tacoma, Washington, appearing by Copeland & Tollefson, their attorneys, and said defendants Director of Fisheries and Director of Game appearing by Smith Troy, Attorney General, and Lee Olwell, Harold E. Pebbles and William E. Hicks, Special Assistant Attorneys General, its attorneys, and written briefs having been submitted to the Court by the parties, and the Court having heard the argument of counsel and considered the same and said briefs, and the Court being of the opinion that the plaintiff as a subordinate subdivision of the State cannot question the constitutionality or applicability of Chapter 9, Laws of 1949, and that the complaint does not state facts sufficient to constitute a cause of action against any of the defendants, and that the sustaining of said defendant taxpayers demurrer substantially disposes of this action and that it is not necessary to consider certain other questions presented upon said argument or to rule or pass upon plaintiff's demurrer to said cross complaint, and the Court having on September 18, 1952, rendered and filed [fol. 31] herein a written memorandum opinion to that effect, and plaintiff at the time of presentation of this order having elected to stand on its complaint and declined to further plead, it is now by the Court

Ordered that the demurrer of defendants The Taxpayers of Tacoma, Washington, to the complaint herein be and the same is hereby sustained, and it is further

Ordered that the complaint herein be and the same is hereby dismissed with prejudice and with costs as to all of the defendants.

To all of which plaintiff excepts and its exceptions are allowed.

Dated at Olympia, Washington, December 15, 1952.

/s/ Charles T. Wright, Judge.

Presented by:

/s/ E. K. Murray, Of Atty for Pltf.

Approved as to form:

/s/ E. K. Murray, Of Attorneys for Plaintiff.
/s/ R. W. Copeland, Of Attorneys for Defendants Taxpayers.

Copy Rec'd 12/15/52

/s/ Lee Olwell, Of Attorneys for Defendants Directors of Fisheries and Game.

[File endorsement omitted]

[fol. 32] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed January 14, 1953

To: Defendants J. Ralph Williams, Robert L. Fox, Chester C. Paulsen and E. R. McKee, representative taxpayers of Tacoma, Washington, and Copeland & Tollefson, their attorneys, and defendants Robert Schoettler, as Director of Fisheries, and John A. Biggs, as Director of Game, of the State of Washington, and Smith Troy, Attorney General, and Lee Olwell, Harold A. Pebbles and William E. Hicks, Special Assistant Attorneys General, and Donald W. Eastvold, successor to said Smith Troy as Attorney General, their attorneys:

You and each of you are hereby notified that the City of Tacoma, a municipal corporation, the plaintiff above named, feeling aggrieved thereby, does hereby appeal to the Supreme Court of the State of Washington from that certain judgment made and entered herein by the above entitled Court on December 15, 1952, by the terms of which

judgment the demurrer of said defendants Representative Taxpayers of Tacoma, Washington, to plaintiff's complaint herein was sustained and, plaintiffs having elected to stand on said complaint, said complaint dismissed with prejudice and with costs as to all of the defendants.

This appeal is taken from said judgment and the whole and every part thereof.

Dated January 12, 1953.

Clarence M. Boyle, Corporation Counsel, Dean Barline, Assistant Corporation Counsel, E. K. Murray, Special Counsel. Attorneys for Plaintiff, 300 City Hall, Tacoma 2, Washington.

[fol. 33] Proofs of service (omitted in printing)

[File endorsement]

[fol. 34] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THURSTON COUNTY

[Title omitted]

NOTICE OF CROSS APPEAL—Filed January 14, 1953

To: The City of Tacoma, a municipal corporation, plaintiff, and to Clarence M. Boyle, Corporation Counsel, Dean Barline, Assistant Corporation Counsel and E. K. Murray, special counsel, attorneys for said plaintiff, and to the Defendant Taxpayers of Tacoma, J. Ralph Williams, Robert L. Fox, Chester C. Paulsen and E. R. McKee, representatives of said defendant taxpayers, and to Copeland & Tollefson, attorneys for said defendant taxpayers.

You and each of you are hereby notified that the defendants Robert Schoettler as Director of Fisheries and John A. Biggs as Director of Game of the State of Washington and said state feel themselves aggrieved and do hereby

appeal to the Supreme Court of the State of Washington from the failure and refusal on the part of this Superior Court to make and enter herein an order overruling demurrer of plaintiff to amended answer and cross complaint of these defendants as offered to this court and proposed by them on December 15, 1952; from the failure and refusal on the part of said court to make and enter herein findings of fact, conclusions of law and judgment against plaintiff in favor of these defendants in the form proposed by them on December 29, 1952, and from the said court's rejection of such findings of fact, conclusions of law and judgment on said last mentioned date.

Dated this 14th day of January, 1953.

Harold A. Pebbles, Special Assistant Attorney General of counsel for the defendants Robert Schoettler as Director of Fisheries and John A. Biggs as Director of Game of the State of Washington.

[fol. 35] [File endorsement omitted]

IN THE SURPEME COURT OF THE STATE OF WASHINGTON
SEPTEMBER SESSION A. D. 1953

Be It Remembered, That at a regular session of the Supreme Court of the State of Washington begun and holden at Olympia on the second Monday of September, A. D. 1953, it being the fourteenth day of said month, among other, the following was had and done, to-wit:

Monday, December 14, 1953

THE CITY OF TACOMA, a municipal corporation, Appellant,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, Respondents, ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game of the State of Washington, Respondents and Cross-Appellants.

JUDGMENT—December 14, 1953

No. 32411

Thurston County No. 26572

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 14th day of December, A. D. 1953, on motion of Clarence W. Boyle, Esquire, of counsel for appellant, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby reversed on appellant's appeal from the judgment dismissing its complaint with instructions to overrule the demurrer thereto and proceed further consistently with the views expressed in the opinion, and with respect to the cross-appeal it is dismissed; and that the said J. Ralph Williams, Robrt L. Fox, Chester C. Paulson, and E. R. McKee, representing the respondents The Taxpayers of Tacoma, Washington, have and recover of and from the said The City of Tacoma the costs of this action taxed and allowed at Three hundred eighty-nine and no/100 ($389.00) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

I, Benj. T. Hart, Clerk of the Supreme Court of the State of Washington, do hereby certify that the foregoing is a true copy of the Judgment and Decree in said cause, as the same now remains of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 14th day of December, A. D. 1953.

Benj. T. Hart, Clerk of the Supreme Court, State of Washington.

[fol. 37] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE CITY OF TACOMA, a municipal corporation, Appellant,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, Respondents,

ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, Respondents and Cross-Appellants.

No. 32411

EN BANC OPINION—October 14, 1953

This action was instituted by the City of Tacoma against the taxpayers of Tacoma and the direction of game and fisheries of the state of Washington, under the provisions of RCW 7.24.010 *et seq.* [*cf.* Rem. Rev. Stat. (Supp.), §§784-1, *et seq.*], relating to declaratory judgments, and RCW 7.24.150 *et seq.* [*cf.* Rem. Rev. Stat. (Supp.), §§5616-11 *et seq.*] providing for testing and determining the validity of a proposed bond issue.

The purpose of the suit was to determine plaintiff's right to issue and sell certain utility bonds to finance the construction of two power dams on the Cowlitz river in Lewis county, Washington, as provided by its ordinance No. 14386, and particularly to determine whether chapter 9, Laws of 1949 [*cf.* RCW 75.20.010 *et seq.*] or §§46 and 49, chapter 112, Laws of 1949 [*cf.* RCW 75.20.050 and 75.20.100] or any other law of the state of Washington is a bar to such construction and to the issuance and sale of the bonds.

Pursuant to the provisions of RCW 7.24.150, the superior court for Pierce county appointed certain citizens and tax-[fol. 38] payers to represent all taxpayers of the city of Tacoma as defendants in the suit. The defendant taxpayers demurred to the complaint. The directors of game and fisheries filed an amended answer and cross-complaint, denying the material allegations of the complaint and by way of affirmative defense and cross-complaint alleged

that the contemplated dam construction was illegal under state law. The directors prayed that ordinance No. 14386 of the city of Tacoma be adjudged unlawful and that plaintiff be perpetually enjoined from constructing the dams. Plaintiff demurred to the amended answer and cross-complaint.

By stipulation of the parties and order of the superior court for Pierce county the venue of the case was transferred to the superior court of Thurston county. That court heard arguments and sustained the taxpayers' demurrer to the complaint on the ground that it failed to state a cause of action and stated in its order of dismissal that this ruling substantially disposed of the entire matter and made it unnecessary to consider plaintiff's demurrer to the cross-complaint. Upon plaintiff's election to stand on its complaint the court dismissed the action with prejudice.

Plaintiff has appealed from the judgment of dismissal. Defendant directors have cross-appealed from the court's refusal to enter an order overruling plaintiff's demurrer to their amended cross-complaint and its refusal to enter findings of fact, conclusions of law and judgment against plaintiff.

For purposes of this appeal the city of Tacoma will be referred to as appellant; the tapayers of Tacoma will be referred to as respondents and the directors of game and fisheries as cross-appellants.

The facts alleged in appellant's complaint which are necessary to an understanding of this controversy are these:

[fol. 39] On August 6, 1948, appellant filed with the Federal Power Commission its declaration of intention to construct two power dams on the Cowlitz river in the state of Washington, pursuant to §23(b) of the Federal Power Act (16 U.S.C.A. §817).

Thereafter, on December 28, 1948, it filed with the power commission an application for a Federal license to construct these dams (Project No. 2016). The smaller dam, as proposed, is to be located at mile 52 on the Cowlitz river, about a mile southeast of the town of Mayfield. It is to be approximately 185 feet in height above tailwater, have a storage capacity of approximately 127,000 acre feet and

have a powerhouse with an installed capacity of 120,000 kilowatts in three units.

The larger dam, as proposed, is to be constructed at mile 65 on the same river, approximately two and one-half miles east of the town of Mossyrock. This dam is to be approximately 325 feet above tailwater, have a storage reservoir with a capacity of approximately 1,375,000 acre feet and a powerhouse with an installed capacity of 225,000 kilowatts in three units. Provisions were made for expansion of the kilowatt out put on each plant if necessary.

On March 8, 1949, the power commission made the following preliminary findings:

"(1) Construction and operation of the project proposed by the declarant would affect public lands or reservations of the United States.

"(2) Boats have navigated the Cowlitz River to Toledo and during high water stages boats have navigated the river for some distance above Toledo.

"(3) The United States has improved the Cowlitz River by snagging, dredging and regulating works from its mouth to Toledo to obtain a minimum navigable depth of 2½ feet.

"(4) The Cowlitz River from its point of junction with the Columbia River to at least Toledo is a navigable water of the United States and may be a navigable water of the United States for some distance upstream from Toledo.

"(5) Either or both of the proposed reservoirs would have sufficient usable storage capacity to enable either or both of them to be operated in such a manner as to materially affect the water stage in the Cowlitz River at Toledo or below, which section of the river we have found to be a navigable water of the United States, and [fol. 40] thus the construction of either or both of the proposed reservoirs would materially affect the navigable capacity of the Cowlitz River.

"(6) The interests of interstate or foreign commerce would be affected by the construction and operation of

either or both of the reservoirs proposed by the declarant."

These findings were followed by an order requiring appellant to secure a license under the provisions of the Federal Power Act before commencing construction of either of the proposed dams.

The power commission thereafter conducted extended hearings on appellant's application for a Federal license at which hearings the departments of fisheries and of game of the state of Washington participated as interveners, along with other interested groups.

Under date of November 28, 1951, the power commission issued its opinion (No. 221) and order issuing the license to appellant. The order recited sixty-six findings of fact and then stated:

"The Commission orders:

"(A) This license is issued to the City of Tacoma, Washington, under Section 4 (e) of the Act for a period of 50 years, effective as of the first day of the month in which the accepted license is filed with the Commission by the Licensee, for the construction, operation and maintenance of Project No. 2016 upon the Cowlitz River, a stream over which Congress has jurisdiction, and upon lands of the United States, subject to the terms and conditions of the Act which is incorporated by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

"(B) This license is also subject to the terms and conditions set forth in Form L-6 entitled 'Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States', which terms and conditions are attached hereto and made a part hereof; and subject to the following special conditions set forth herein as additional articles:

[Here follow Articles 28 to 35, inclusive.]

"(C) The exhibits specified in paragraph (63) above are approved as part of this license.

"(D) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed within the 30-day period provided by Section 313 (a) of the Act.

"(E) This license shall be accepted and returned to the Commission within 60 days from date of issuance of this order."

Appellant by authority of its city council formally accepted all the provisions, terms and conditions of this license on December 28, 1951.

[fol. 41] On December 26, 1951, the departments of fisheries and of game and the Washington State Sportsmen's Council, Inc., filed an application for rehearing. This application was denied by the power commission on January 22, 1952, in an order stating in part:

"The Interveners appear to be under the impression that the Commission failed to consider the proposed Cowlitz Project in relation to the Columbia Basin as a whole. As shown by the numerous specific findings in the opinion and order issued November 28, 1951, the Commission considered and analyzed the evidence as related specifically to the Cowlitz Project alone and as related to the comprehensive development of the entire Columbia River Basin. It was only after the Commission had examined all the plans in evidence relating to the comprehensive development of the Pacific Northwest Region that it reached the conclusion that the Cowlitz Project was best adapted to a comprehensive plan for developing the Columbia River watershed for the use and benefit of interstate commerce and the other beneficial public uses."

On January 9, 1952, appellant's city council duly enacted ordinance No. 14386 (which became effective January 20, 1952) in which it adopted the plan and system therein described and designated as the Cowlitz Power Development as an addition to, and an extension of, its existing facilities for the generation and distribution of electric energy. This ordinance authorized the construction of the Mossyrock

and Mayfield dams and, to provide the necessary additional funds, authorized the issuance and sale of utility revenue bonds, from time to time, not exceeding the total principal amount of $146,000,000. There was included in the ordinance the following:

> "The construction of this project has been licensed by the Federal Power Commission under Project No. 2016, and the construction herein authorized shall conform with the requirements of such license.
>
> "Section 3. That the entire improvement consisting of the additions and betterments to and extensions of the said existing electric generating plant and system shall be known and designated as Cowlitz Power Development. That the total estimated cost of said Development declared as near as may be is the sum of $146,000,000.00."

Appellant's complaint, containing the allegations which we have summarized above, was verified February 6, 1952. [fol. 42] The cross-appellants state in their brief that a petition for review of the orders of the power commission involved in this case has been filed by them in the Circuit Court of Appeals for the Ninth Circuit (being cause No. 13289) and that the matter is now pending in that court. Consequently, the license issued to appellant is still in litigation and has not become effective. Nevertheless, the present case has been submitted by the parties to this court and we deem it proper to decide it on the record presented to us.

[Subsequent to the preparation of this opinion the Circuit Court of Appeals on October 5, 1953, rendered its decision declining to interfere with the power commission's order. See 207 F. (2d) 391.]

The first question to be considered is whether appellant's complaint states a cause of action. On this appeal the demurrer admits all facts well pleaded and reasonable inferences to be drawn therefrom. *Slater* v. *Bird*, 40 Wn. (2d) 848, 246 P. (2d) 460, and cases cited. Thus it is admitted that the power commission found that appellant's proposed project will affect the navigability of at least

part of the Cowlitz river which it has determined to be a navigable water of the United States; that it will affect the interests of interstate commerce; that it will affect public lands or reservations of the United States and that, therefore, the project is thus within the jurisdiction of the Federal Power Commission under the Federal Power Act. It is further admitted that the power commission has rendered its opinion No. 221 and has issued its license in the form attached to the complaint as Exhibit "D".

The question presented is whether appellant, having complied with all applicable Federal laws and possessing a license issued by the Federal Power Commission, is barred from constructing the project because of certain laws of the state of Washington relating to the protection of fish.

The two acts principally relied upon by respondents and cross-appellants as barring appellant's construction of this project were enacted in 1949. They are:

[fol. 43] (1) The Columbia River Fish Sanctuary Act (Chap. 9, Laws of 1949).

This act is entitled:

> "An Act relating to the protection of anadromous fish life in the rivers and streams tributary to the lower Columbia River and declaring an emergency."

Section 1 of the act [*cf.* RCW 75.20.010] reads:

> "All streams and rivers tributary to the Columbia River downstream from McNary Dam are hereby reserved as an anadromous fish sanctuary against undue industrial encroachment for the preservation and development of the food and game fish resources of said river system and to that end there shall not be constructed thereon any dam of a height greater than twenty-five (25) feet that may be located within the migration range of any anadromous fish as jointly determined by the Director of Fisheries and the Director of Game, nor shall waters of the Cowlitz River or its tributaries or of the other streams within the sanctuary area be diverted for any purpose other than fisheries in such quantities that will reduce the respective stream flows below the annual average low flow, as

delineated in existing or future United States Geological Survey reports: *Provided,* That when the flow of any of the streams referred to in this section is below the annual average, as delineated in existing or future United States Geological Survey reports, water may be diverted for use, subject to legal appropriation, upon the concurrent order of the Director of Fisheries and Director of Game."

Section 2 requires cross-appellants to acquire and abate any dam on any stream which may be in conflict with §1. Section 3 exempts dams on two named rivers and §4 declares an emergency.

(2) Chapter 112, Laws of 1949, known as the Fisheries code of the state of Washington.

Section 46 thereof [*cf.* RCW 75.20.050] provides:

"It is hereby declared to be the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.

"The Supervisor of Hydraulics shall give the Director of Fisheries and the Director of Game notice of each application for a permit to divert water, or other hydraulic permit of any nature, and the Director of Fisheries and Director of Game shall have thirty (30) days after receiving said notice in which to state their objections to the application, and the permit shall not be issued until the thirty (30) days period provided for herein has elapsed.

[fol. 44] "The Supervisor of Hydraulics may refuse to issue any permit to divert water, or any hydraulic permit of any nature, if, in the opinion of the Director of Fisheries or Director of Game, such a permit might result in lowering the flow of water in any stream below the flow necessary to adequately support food fish and game fish populations in the stream.

"The provisions of this section shall in no way affect existing water rights."

Section 49 thereof [*cf.* RCW 75.20.100] provides:

> "In the event that any person or government agency desires to construct any form of hydraulic project or other project that will use, divert, obstruct or change the natural flow or bed of any river or stream or that will utilize any of the waters of the state or materials from the stream beds, such person or government agency shall submit to the Department of Fisheries and the Department of Game full plans and specifications of the proposed construction or work, complete plans and specifications for the proper protection of fish life in connection therewith, the approximate date when such construction or work is to commence and shall secure the written approval of the Director of Fisheries and the Director of Game as to the adequacy of the means outlined for the protection of fishlife in connection therewith and as to the propriety of the proposed construction or work and time thereof in relation to fish life, before commencing construction or work thereon. If any person or government agency shall commence construction on any such works or projects without first providing plans and specifications subject to the approval of the Director of Fisheries and the Director of Game for the proper protection of fish life in connection therewith and without first having obtained written approval of the Director of Fisheries and the Director of Game as to the adequacy of such plans and specifications submitted for the protection of fish life, he shall be guilty of a gross misdemeanor. If any such person or government agency be convicted of violating any of the provisions of this act and continues construction on any such works or projects without fully complying with the provisions of this act, such works or projects are hereby declared a public nuisance and shall be subject to abatement as such. . . ."

Respondents and cross-appellants contend that these statutes are a valid exercise of the police power of the state to preserve its fishery resources for the common welfare of its citizens and must be complied with before

appellant can proceed with the construction of its project.

In order to pass upon the validity of these state laws it is necessary to review in some detail the provisions and constitutional background of the Federal Water Power Act.

In 1920 Congress passed that act, which created the [fol. 45] Federal Power Commission with authority to license projects to develop the navigable waters of the United States. This was a major undertaking and was the outgrowth of a widely supported effort of the conservationists to secure enactment of a comprehensive plan of national regulation which would promote the integrated development of the water resources of the nation, to the extent that it was within the Federal power to do so. *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U.S. 152, 90 L. Ed. 1143, 66 S. Ct. 906, (which is the leading case on this subject to which extended reference will be made later).

The Federal Water Power Act of 1920, as amended, was incorporated into the Federal Power Act in 1935. (16 U.S.C.A. §§791a-823). The sections of the act which are particularly pertinent to the present controversy are set forth below.

Section 3 of the act (16 U. S. C. A. §796) defines certain words including "licensee", "municipality" "navigable waters" and "municipal purposes" which have a bearing upon our present problem.

Section 4 (16 U.S.C.A. §797), defining the commission's authority and powers, provides in subsection (e):

> "(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water

over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: . . . "

Section 9 (16 U.S.C.A. §802), prescribing information to be furnished the power commission by the applicant, includes in subsection (b) the following:

[fol. 46] "(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter."

Section 10 (16 U.S.C.A. §803) provides the conditions upon which a license shall be issued by the power commission. Subsection (a) provides:

"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

Section 23(b) (16 U.S.C.A. §817) so far as is pertinent reads:

"... Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter...."

Section 27 (16 U.S.C.A. §821) contains the following provisions:

"Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

[fol. 47] The Federal Power Act was considered by the supreme court of the United States in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 85 L. Ed. 243, 61 S. Ct. 291, where the extent of the control of the Federal government over navigable streams was defined. The attorneys general of forty-one states (including the state of Washington) filed a brief as *amici curiae* in which they contended that the power of the government to control the erection of structures in such streams did not include the power to prescribe conditions not related to navigation. The court stated the relationship between Federal and state control over navigable streams to be as follows:

"The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution. 'The Congress shall have Power . . . To regulate Commerce . . . . among the several States.' It was held early in our history that the power to regulate commerce necessarily included power over navigation. To make its control effective the Congress may keep the 'navigable waters of the United States' open and free and provide by sanctions against any interference with the country's water assets. It may legislate to forbid or license dams in the waters; its power over improvements for navigation in rivers is 'absolute.'

"The states possess control of the waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers.' It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters."

The court upheld the conditions in the license to which objection had been made and again referred to the power of the government, saying:

"The respondent is a riparian owner with a valid state license to use the natural resources of the state for its enterprise. Consequently it has as complete a right to the use of the riparian lands, the water, and the river bed as can be obtained under state law. The state and respondent, alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce. The power flows from the grant to regulate, i.e., to 'prescribe the rule by which commerce is to be governed.' This includes the protection of navigable waters in capacity as well as use. This power of Con-

[fol. 48] gress to regulate commerce is so unfettered that its judgment as to whether a structure is or is not a hindrance is conclusive. Its determination is legislative in character. The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.

"Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license. This power is exercised through §9 of the Rivers and Harbors Act of 1899, [33 USCA §401], prohibiting construction without congressional consent and through §4 (e) of the present Power Act, [16 USCA §797 (e)].

* * * * * * *

"The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that 'its exercise is attended by the same incidents which attend the exercise of the police power of the states.' The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment."

Appellant argues that chapter 9, Laws of 1949, §§46 and 49 of chapter 112, Laws of 1949, and other related statutes are in direct conflict with §10 (a) of the Federal Power

Act requiring the project adopted to be *"such as in the judgment of the Commission will be best adapted to a comprehensive plan . . . for the improvement and utilization of waterpower development, and for other beneficial public uses."*

Chapter 9, Laws of 1949, purports to (1) prohibit the building of any dam of a height greater than twenty-five feet and (2) prohibit the diversion of waters for any purpose other than fisheries, upon the Cowlitz river.

Section 46 of chapter 112 purports to authorize the supervisor of hydraulics to refuse to issue a permit to divert water, or any hydraulic permit of any nature, if in the opinion of cross-appellants the issuance thereof might re- [fol. 49] sult in lowering the water in any stream below the flow necessary to support the food and game fish population.

Section 47 of chapter 112 purports to require the owner or person in charge of a dam or other obstruction to provide such fish ladders or fishways as the director of fisheries may approve.

Section 48 of chapter 112 purports (in the event that the director of fisheries determines that fish ladders and fishways are impracticable) to require the person or agency who desires to build a dam or other hydraulic project to (1) convey to the state a site or sites satisfactory to the director of fisheries, erect thereon fish hatcheries suitable to the director and provide the money necessary for operation and maintenance, or (2) pay to the state such money as the director may determine is necessary to expand, maintain and operate additional facilities at existing hatcheries.

Section 49 of chapter 112 purports to require the written approval of cross-appellants as to the adequacy of plans and specifications for protection of fish life and as to the propriety of the proposed project and time of construction thereof in relation to fish life, before construction of the project is commenced.

Violations of §§47, 48 and 49 are declared to be gross misdemeanors and penalties are provided.

It is obvious that compliance with the fish sanctuary act would force abandonment of the Cowlitz Power Development project by appellant and that compliance with these provisions of the Fisheries Code would give cross-appellants a veto power over the power commission's right to issue appellant a license for its construction. Hence the two state laws are in direct conflict with the Federal act, in so far as this project is concerned.

Respondents and cross-appellants, on the other hand, contend that these laws were passed for the express pur- [fol. 50] pose of preserving the fisheries resources of the state and are a valid exercise of the police power. They point out that it has often been held that a state may validly enact regulations for the preservation of game and fish in the exercise of the police power. *Skiriotes* v. *Florida,* 313 U.S. 69, 85 L. Ed. 1193, 61 S. Ct. 924; *Foster Fountain Packing Co.* v. *Haydel,* 278 U.S. 1, 73 L. Ed. 147, 49 S. Ct. 1; *State* v. *Towessnute,* 89 Wash. 478, 154 Pac. 805; *State ex rel. Campbell* v. *Case,* 182 Wash. 334, 47 P. (2d) 24.

It may be conceded that fish in the waters of the state belong to the people of the state in their sovereign capacity, that the legislature may permit or prohibit the taking thereof and that the Federal government has no ownership of, or power to regulate the taking of, fish in navigable waters. See *Davis* v. *Olsen,* 128 Wash. 393, 222 Pac. 891. Nevertheless, where these state laws are in direct conflict with the Federal Power Act they are invalid under the terms of the supremacy clause contained in Article VI of the United States constitution. This provision reads:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Where, as here, the state and Federal acts cannot be reconciled or consistently stand together, the action of a state even under its police power must give way. The language used by the court in *Morris* v. *Jones,* 329 U.S. 545,

91 L. Ed. 488, 67 S. Ct. 451, relating to an analogous situation, is applicable to this case. It was there said:

> "This is to argue that by reason of its police power a State may determine the method and manner of proving claims against property which is in its jurisdiction and which is being administered by its courts or administrative agencies. We have no doubt that it may do so except as such procedure collides with the federal Constitution or an Act of Congress. See *Broderick* v. *Rosner*, 294 U.S. 629. *But where there is such a collision, the action of a State under its police power must give way by virtue of the Supremacy Clause.* Article VI, Clause 2. There is such a collision here." (Italics ours.)

[fol. 51] But respondents and cross-appellants argue that, assuming the supremacy of the Federal Power Act, Congress in enacting it did not intend to exclude the state from exercising jurisdiction and control over the fisheries resources of the state. In support of their argument that appellant must comply with the state laws protecting the fisheries resources they cite §§9 (b) and 27 of the Federal Power Act which we have quoted above.

Because we are of the opinion that the principal issues of law involved in this case (both as to the constitutional question and the correct interpretation of §9 (b) and §27 of the act) are controlled by the decision of the supreme court of the United States in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission, supra*, we will discuss this case in some detail.

In that case the Cooperative had applied to the power commission for a license to construct a dam on the Cedar river near Moscow, Iowa, and divert all of the water (except about twenty-five second feet) from the river bed below the dam by means of an eight mile diversion canal to Muscatine on the Mississippi river where a hydro-electric plant was to be constructed. This was a radical change. In its natural state the Cedar river continued to flow southeasterly from the dam site for a distance of twenty-nine miles where it flowed into the Iowa river which, in turn,

after traveling an equal distance flowed into the Mississippi river about twenty miles below Muscatine.

After the power commission made its jurisdictional findings the state of Iowa intervened and opposed the granting of a license on the ground that the Cooperative had no permit from the executive council of the state as required by the Iowa statute. The Cooperative had applied for such permit and it had been denied by the executive council. [fol. 52] The two sections of the 1939 Code of Iowa, which were the principal basis of the state's objection to the issuance of a license by the power commission, provided:

> "7767. Prohibition-permit. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same."
>
> "7771. When permit granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place *without being* materially diminished in quantity or polluted or *rendered deleterious to fish life,* it shall grant the permit, upon such terms and conditions as it may prescribe." (Italics ours.)

It was the state's contention that under §9 (b) and §27 of the Federal Power Act an applicant was required to comply with state laws before being entitled to the issuance of a license from the power commission. The power commission sustained the state's position and denied the Cooperative a license.

The case in due course was considered on certiorari by the supreme court of the United States which overruled the

contentions of the state of Iowa and remanded the matter to the power commission for further proceedings in conformity with the court's opinion.

The court interpreted the provisions of the Federal Power Act and concluded that chapter 363 (now chapter 469) of the Code of Iowa and especially §§7767 and 7771, as quoted above, need not be complied with by an applicant for a Federal license. The court said:

> "In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act estab-[fol. 53] lishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. In fact a contrary policy is indicated in §§4 (e), 10 (a), (b) and (c), and 23 (b). In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission. A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable. 'Compliance with the requirements' of such a duplicated system of licensing would be nearly as bad. Conformity to both standards would be impossible in some cases and probably difficult in most of them. The solution adopted by Congress, as to what evidence an applicant for a federal license should submit to the Federal Power Commission, appears in §9 of its Act. It contains not only subsection (b) but also subsections (a) and (c). Section 9 (c) permits the Commission to secure from the applicant 'Such additional information as the commission may require.' This enables it to secure, *in so far as it deems it material*, such parts or

all of the information that the respective States may have prescribed in state statutes as a basis for state action. The entire administrative procedure required as to the present application for a license is described in §9 and in the Rules of Practice and Regulations of the Commission."

The following language answers respondents' and cross-appellants' contention that appellant must comply with the fish sanctuary act and the Fisheries Code of 1949 in order to construct the Cowlitz Development:

"The securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a federal license. It is a procedure required by the State of Iowa in dealing with its local streams and also with the waters of the United States within that State in the absence of an assumption of jurisdiction by the United States over the navigability of its waters. Now that the Federal Government has taken jurisdiction of such waters under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements.

. . . . . .

"The Act leaves to the States their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States. These sources of constitutional authority are all applied in the Federal Power Act to the development of the navigable waters of the United States.

"The closeness of the relationship of the Federal Government to these projects and its obvious concern [fol. 54] in maintaining control over their engineering, economic and financial soundness is emphasized by such provisions as those of §14 authorizing the Federal Government, at the expiration of a license, to

take over the licensed project by payment of 'the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken,' plus an allowance for severance damages. The scope of the whole program has been further aided, in 1940, by the definition given to navigable waters of the United States in *United States* v. *Appalachian Power Co.*, 311 U.S. 377. 'Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons* v. *Ogden*, 9 Wheat. 1, to *United States* v. *Appalachian Power Co.*, 311 U.S. 377.' *Northwest Airlines* v. *Minnesota*, 322 U.S. 292, 303.

* * * * * * *

"As indicated by Representative LaFollette, Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of the constitutional rights of the States so as to sustain the validity of the Act. The resulting integration of the respective jurisdictions of the State and Federal Governments is illustrated by the careful preservation of the separate interests of the States throughout the Act, without setting up a divided authority over any one subject.

"Sections 27 and 9 are especially significant in this regard. Section 27 expressly 'saves' certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act. It provides:

"'Sec. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.' 41 Stat. 1077, 16 U.S.C. §821.

"Section 27 thus evidences the recognition by Congress of the need for an express 'saving' clause in the Federal Power Act if the usual rules of supersedure are to be overcome. Sections 27 and 9 (b) were both included in the original Federal Water Power Act of 1920 in their present form. The directness and clarity of §27 as a 'saving' clause and its location near the end of the Act emphasizes the distinction between its purpose and that of §9 (b) which is included in §9, in the early part of the Act, which deals with the marshalling of information for the consideration of a new federal license. In view of the use by Congress of such an adequate 'saving' clause in §27, its failure to use similar language in §9 (b) is persuasive that §9 (b) should not be given the same effect as is given to §27.

"The effect of §27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase 'any vested right acquired therein' further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words 'other uses.' Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. This wa so held in an early decision by a Dis-[fol. 55] trict Court, relating to §27 and upholding the constitutionality of the Act, where it was stated that 'a proper construction of the act requires that the words "other uses" shall be construed ejusdem generis with the words "irrigation" and "municipal."' *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606, 619.

"This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus 'saved' to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course."

The Federal Power Act, as construed in the *Appalachian Electric* case, *supra*, and the *First Iowa* case, is the supreme law of the land and under the supremacy clause (Art. VI, U.S. Constitution) is binding upon this court. On the authority of those decisions we must hold that Congress had the constitutional power to enact the Federal Power Act and that in doing so it intended to exercise its full jurisdiction to authorize the power commission to supersede state laws purporting to prohibit or limit the construction of dams on navigable streams. By passing the act Congress pre-empted the entire field and authorized the power commission to issue licenses for such construction upon such conditions as it deemed proper.

After the decision of the supreme court in the *First Iowa* case, *supra*, the matter was remanded to the Federal Power Commission which thereafter granted the license applied for. This action was reviewed by the Circuit Court of Appeals for the Eighth Circuit in *Iowa* v. *Federal Power Commission*, 178 F. (2d) 421. In that case the state contended *inter alia* that the issuance of the license was invalid because the power commission had failed to give adequate consideration to the effect of the project on wildlife resources as required by the Act of Congress of August 14, 1946. One of the conditions of the license was that:

> "'The licensee shall construct, maintain and operate such fish protective devices and shall comply with such reasonable conditions in the interest of fish life as may be hereafter prescribed upon the recommendation of the Secretary of the Interior.'"

The court denied the state's petition to set aside the power commission's order granting the license, saying as to the state's contention:

> [fol. 56] "The Commission in its brief points out that, in the hearings held prior to the enactment of the Act of August 14, 1946, the Iowa Conservation Commission, as intervener, appeared and produced evidence 'with regard to fish life in the area and the probable effect of the project thereon.' Apparently, the views of the State Conservation Commission were received and con-

sidered by the Federal Power Commission. Moreover, under the terms of the license, the applicant may still be required to do whatever may be reasonable for the protection of fish life. The defects, if any, in the Commission's proceedings relative to the protection of wildlife resources could not, in our opinion, be regarded as sufficiently vital or prejudicial to justify a vacation of the orders under review."

While it has no bearing upon the issues in this case, it may be of interest to those concerned about the preservation of anadromous fish life on the upper Cowlitz river that the power commission, as it did in the case of *Iowa* v. *Federal Power Commission, supra,* has placed in appellant's license conditions dealing with protection of fish life. These conditions read:

"*Article 30.* Before beginning the construction of any permanent fish ladders, fish traps or other fish handling facilities or fish protective devices, the Licensee shall make further studies, tests and experiments to determine the probable effectiveness of such facilities and devices and shall submit plans therefor and obtain Commission approval. In making such studies, tests and experiments and in the preparation of final design plans, the Licensee shall cooperate with the United States Fish and Wildlife Service and the Departments of Fisheries and Game of the State of Washington. The Licensee shall continue its studies and investigations with respect to its proposed program of stream improvement and hatchery facilities. The Licensee shall submit quarterly reports to the Commission of its activities hereunder."

"*Article 31.* The Licensee shall construct, maintain and operate such fish ladders, fish traps or other fish handling facilities or fish protective devices and make such stream improvements and provide such fish hatcheries and similar facilities and comply with such reasonable modifications of the project structures and operation in the interest of fish as may be prescribed hereafter by the Commission upon its own motion or

upon the recommendation of the Secretary of the Interior."

Furthermore, Congress since 1946 has required the Federal Power Commission to

> " . . . consult with the Fish and Wildlife Service and the head of the agency exercising administration over the wildlife resources of the State wherein the impoundment, diversion, or other control facility is to be constructed with a view to preventing loss of and damage to wildlife resources. . . ." (60 Stat. 1080, 16 U.S.C.A. Sup., §662)

It is vigorously asserted by respondents and cross-[fol. 56A] appellants that appellant, being a municipal corporation created by the state, may not defy the laws of its creator. In other words, assuming that appellant ever had the power to construct dams on rivers resulting in the destruction of fish life, it is contended that the legislature has taken that right away with respect to the Cowlitz river by enacting the fish sanctuary act (Chap. 9, Laws of 1949).

The legislature must be presumed to have known when enacting that law that for at least forty years all classes of municipal corporations had been authorized by it to operate certain public utilities. *Hutton* v. *Martin*, 41 Wn. (2d) 780, 252 P. (2d) 581. As last amended in 1947 the pertinent statute (Rem. Supp. 1947, §9488 [*cf.* RCW 80.40.050] included power to:

> "Construct, condemn and purchase, purchase, acquire, add to, maintain and operate works, plants, and facilities for the purpose of furnishing such city or town and the inhabitants thereof, and any other persons, with gas, electricity and other means of power and facilities for lighting, heating, fuel and power purposes. . . ."

In *Tacoma* v. *Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199, appellant was seeking to condemn property for power purposes upon a petition alleging:

> "That at all times since the year 1893 the city of Tacoma has been engaged in the business of owning, operating and maintaining works, plants and facilities for the purpose of furnishing said city and the inhabitants thereof with electricity and facilities for lighting, heating, fuel and power purposes, public and private."

This would seem to indicate that appellant for about sixty years has been engaged in the business of producing and selling electric power.

In *Tacoma* v. *State*, 121 Wash. 448, 209 Pac. 700, appellant was permitted to condemn state land for the purpose of constructing a dam as part of a hydroelectric project. The state contended that the city's diversion of the water of a certain stream would destroy or damage the propagation of food fish. After referring to the "broad powers conferred upon cities by our statute, Rem. Com-[fol. 56B] piled Statutes, §9488" this court answered the state's objection to this condemnation of its rights as follows:

> "The contention that the diversion of the waters will destroy or seriously damage the propagation of food fish, we cannot find to be sustained by a preponderance of the evidence. But even if it were, we would be reluctant to hold that the fish, by following their natural instincts, had devoted the stream to such a public purpose as would defeat the city's rights under the statutes hereinbefore cited."

The passage of chapter 9, Laws of 1949, does not purport to amend or repeal Rem. Supp. 1947, §9488. No reference whatever is made therein to municipal corporations or their right to engage in the production and sale of electric energy. It cannot be viewed as a repeal of this statute by implication.

Conceding that the legislature has the power to curtail or abolish appellant's present authority to engage in the electric utility business, we are convinced that it has not as yet exercised such power.

The Federal Power Act defines the term municipal corporation and authorizes the power commission to issue a license to such an entity. Appellant has complied with the state law with respect to the right of a municipality to engage in the business of developing, transmitting and distributing power. Having been granted a license by the power commission, we hold that appellant is at the present time in the same position as any other licensee under the act. See *State ex rel. Washington Water Power Co. v. Superior Court*, 34 Wn. (2d) 196, 208 P. (2d) 849.

The further contention is made that a municipal corporation has no rights which are protected by the United States constitution. In support of this position several cases are cited relating to the Fourteenth Amendment which, in substance, guarantees to "any person" due process and equal protection of the laws, and cases relating to Art. I, §10, prohibiting the impairment of contracts. See 116 A.L.R. 1037.

[fol. 56C] This contention is without merit because in the present case the right of appellant to proceed with the construction of this project is based on the Federal Power Act which, in turn, is based on the commerce clause of the Federal constitution. Fundamentally, it is the United States whose power to regulate commerce on navigable streams is primarily being questioned in this suit. Appellant's rights under its license from the power commission are governed by the Federal Power Act and have no relation to the Fourteenth Amendment nor to Art. I, §10, of the Federal constitution.

Since we have found that the two state laws involved in this case *to the extent that they are in conflict with* the Federal Power Act are inoperative, we do not deem it necessary to pass upon appellant's other contentions that these laws violate certain provisions of the state constitution and are invalid *in toto*.

Paraphrasing the language of the supreme court in concluding its opinion in the *First Iowa* case, *supra*, we hold that:

It is the Federal Power Commission rather than the Director of Fisheries and the Director of Game of the state of Washington which under our constitutional government

must pass upon the measures necessary for the protection of anadromous fish in the navigable streams in this state on behalf of the people of Washington as well as on behalf of all the people of the United States.

Without further extending this opinion, we deem it sufficient to state that, for the several reasons above set forth, we are of the opinion that appellant's complaint states a cause of action and that on the basis of the facts alleged therein appellant has a valid license issued by the power commission for the construction of the Cowlitz Power Development and that the utility bonds authorized by ordinance No. 14386 have not been shown to be invalid in any respect.

[fol. 57] On appellant's appeal the judgment dismissing its complaint is reversed with instructions to overrule the demurrer thereto and to proceed further in this case consistently with the views expressed herein.

With respect to the cross-appeal the trial court's order dismissing appellant's complaint recited that it was not necessary "to rule or pass upon plaintiff's demurrer to said cross-complaint." Since the trial court did not pass upon that question or enter any final order regarding that issue, there is nothing for this court to review on the cross-appeal. Accordingly, it must be, and hereby is, dismissed.

Donworth, *J.*

We concur:

Mallery, *J.*, Schwellenbach, *J.*, Finley, *J.*, Weaver, *J.*, Olson, *J.*

[fol. 58]

Hamley, *J.* (dissenting)—In my opinion, the enactment of Laws of 1949, chapter 9 (*cf.* RCW 75.20.010, 020, 030), represents the exertion of two distinct powers of state government—the police power of the state to preserve its fishing resources, and the power to define and control the functioning of subordinate units of government.

In so far as chapter 9 is sought to be applied as an exercise of police power, it may or may not have been superseded by the Federal power act, a question we need not now decide. In so far as chapter 9 is sought to be

applied as an exercise of the power of the state over subordinate units of government, it has not been superseded. The Federal government may not confer corporate powers upon local units of government, and the Federal power act does not purport to do so. The supersedure, if any, with respect to the exertion of police power, does not affect applicability of chapter 9 as an exercise of the other power named, for, in my view, the legislature would have intended the act to remain in force in the latter regard had the matter of supersedure been called to its attention.

That the legislature may restrict the powers of municipalities is beyond question. Cities are limited governmental arms of the state. *Russell* v. *City of Grandview,* 39 Wn. (2d) 551, 236 P. (2d) 1061. They may exercise only those powers which are granted to them in the state constitution or statutes. Except as limited by the constitution, legislative control over municipalities is therefore plenary. *State* v. *Aberdeen,* 34 Wash. 61, 74 Pac. 1022; *Wheeler School District* v. *Hawley,* 18 Wn. (2d) 37, 137 P. (2d) 1010. It follows that the legislature may enlarge or diminish powers already granted to such subordinate units of government. *State ex rel. Nat. Bank of Tacoma* v. *Tacoma,* 97 Wash. 190, 166 Pac. 66. Needless to say, the wisdom of any restriction [fol. 59] which the legislature determines to place upon the corporate powers of municipalities is not an issue in this court.

That the legislature intended Laws of 1949, chapter 9, to restrict the corporate powers of municipalities with regard to the construction of the dams in question, seems clear to me. Under Rem. Supp. 1947, §9488 (*cf.* RCW 80.40.010 *et seq.*), incorporated cities or towns are authorized and empowered to erect and build dams or other works across or at the outlet "of any lake or water course in this state." If that corporate power were left undisturbed, the whole purpose of the fish sanctuary act would be defeated. Hence, when, in chapter 9, the legislature forbade the construction of any dam of a height greater than twenty-five feet on "all streams and rivers tributary to the Columbia River downstream from McNary Dam," it by implication amended or partially repealed Rem. Supp. 1947, §9488, so as to restrict, to that extent, the corporate powers granted by the latter statute.

I recognize that repeals of statutes by implication are not favored, and to so work a repeal the implication must be a necessary one. *Mesher* v. *Osborne,* 75 Wash. 439, 134 Pac. 1092; *Generaux* v. *Petit,* 172 Wash. 132, 19 P. (2d) 911. But, where the subsequent legislation is contrary to, and inconsistent with, a former act, a repeal by implication is effected. *Peterson* v. *King County,* 199 Wash. 106, 90 P. (2d) 729. Here the conflict between Rem. Supp. 1947, §9488, permitting municipal corporations to construct dams for stated purposes across or at the outlet of "any lake or water course in this state," and Laws of 1949, chapter 9, forbidding the construction of dams of a greater height than twenty-five feet on certain water courses, is patent—they cannot both stand.

Appellant argues that the provisions of chapter 9 are not separable, and that if that chapter is superseded to any extent, it is thereby rendered wholly void.

[fol. 60] The question here is not whether part of the statute is enforcible where the remainder has been declared invalid (as in all cases cited by appellant), but whether all of the act is enforcible as to incorporated municipalities if it is found to be unenforcible and void as to other persons and corporations.

The doctrine of separability has most frequently been applied to statutes of which one or more sections were valid, and other sections, relating to other subjects, were unconstitutional. However, the rule is not limited to such instances, and when, as here, the same provision of the statute affects different classes of persons or corporations, as to some of which it is valid, and as to others of which it may be invalid, the valid applications of the statute may be held enforcible. *State* v. *Bevins,* 210 Iowa 1031, 230 N. W. 865; *Robert Dollar Co.* v. *Canadian Car and Foundry Co.,* 220 N. Y. 270, 115 N. E. 711. In the latter case, no question as to the workability of part of a statute is presented, but there does remain the question of whether the legislature would have passed the statute knowing that it would have only its limited application. *Robert Dollar Co.* v. *Canadian Car and Foundry Co., supra; State* v. *Bevins, supra.* For a discussion of the difference between these two kinds of separability problems, see 2 Sutherland

Statutory Construction (3d ed.) 175, 190-194, §§2402, 2413-2416.

In my view, the legislative history of chapter 9 indicates that the legislature would have restricted the corporate powers of municipalities in the respect indicated, even had it then believed that, as to persons and corporations other than incorporated municipalities, the state could not prohibit the building of such structures.

Chapter 9 was introduced as S.B. 4. After it had passed the Senate and when it was on second reading in the House, Representative William D. Shannon moved the adoption of [fol. 60A] an amendment which would have excluded from the operation of the act "the waters of the Cowlitz River lying East of Range 1 East of the Willamette Meridian." House Journal, page 215. During the debate which then ensued on this amendment, the following colloquy occurred:

> "Mr. Carty: 'Mr. Speaker, I would like to ask Mr. Shannon a question.' The Speaker: 'Will the gentleman yield?' Mr. Shannon: 'Yes.' Mr. Carty: 'Just what area of this proposed dam would this line drawn in your amendment cross?' Mr. Shannon: 'A mile and a half below the Mayfield Dam.' Mr. Carty: 'Then the purpose of this amendment would be to make this act ineffective?' Mr. Shannon: 'In my opinion, it wouldn't. It would make a fish sanctuary on all of the lower part of the Cowlitz River; on all the tributaries below the Mayfield Dam, about twenty miles from the Columbia River up.'"

As indicated in the majority opinion, the Mayfield dam is one of the two projects here in question, the other being further upstream on the same river. The purpose of Mr. Shannon's amendment, therefore, was to exclude from the act that portion of the Cowlitz river on which these two dams are sought to be constructed. After this information was disclosed during the exchange quoted above, Mr. Shannon's amendment was laid on the table and the bill was passed in its present form.

It therefore appears that the prime purpose of chapter 9 was to forestall construction of the very dams involved in this case. Nothing in the act, nor in its legislative history,

indicates that the legislature intended to give ground any more than it was compelled to in enforcing the stated policy of protecting anadromous fish life in the rivers and streams tributary to the lower Columbia river. While the construction of high dams by any person or corporation would defeat that purpose, the plan of appellant city to construct the dams in question offered the real threat.

Appellant also argues that chapter 9 was enacted in violation of the Washington constitution, Art. II, §19, pertaining to the subjects to be embraced in a bill, and the form of title; and in violation of Art. II, §1, which vests legislative power in the Senate and House of Representatives. In my opinion, these contentions are without merit, [fol. 61] but no useful purpose will be served by discussing them in this dissenting opinion.

I would affirm the judgment.

Hamley, *J.*

Hill, *J.* (dissenting)—I concur in Judge Hamley's dissent. I am of the opinion, also, that a *license* from the Federal government does not give the licensee the right to disregard legislation enacted by the state of Washington in the exercise of its police power.

Hill, *J.*

I concur in the dissents of Judges Hamley and Hill.

Grady, *C.J.*

[fol. 62] IN THE SUPREME COURT, OF THE STATE OF WASHINGTON

No. 32411

THE CITY OF TACOMA, a municipal corporation, Appellant,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, Respondents,

ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, Respondents and Cross-Appellants.

State of Washington,
County of Thurston, ss.

I, Benj. T. Hart, Clerk of the Supreme Court of the State of Washington, do hereby certify that the attached and foregoing is a full, true and correct copy of the Opinion and the whole thereof, as the same was filed in the above entitled case on the 14th day of October, 1953, and now appears of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 14th day of December, 1953.

Benj. T. Hart, Clerk of the Supreme Court, State of Washington.

[fol. 63] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

No. 26572

THE CITY OF TACOMA, a municipal corporation, Plaintiff,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, Defendants.

ORDER SETTING ASIDE JUDGMENT OF DISMISSAL AND OVERRULING DEFENDANT TAXPAYERS' DEMURRER—December 30, 1953

This matter by agreement of all counsel having regularly come on for hearing this day upon plaintiff's motion to vacate and set aside the order sustaining the demurrer of the defendants J. Ralph Williams, Robert L. Fox, Chester C. Paulsen and E. R. McKee, representative taxpayers of Tacoma, Washington, and the judgment of dismissal entered herein December 15, 1952, and that such demurrer be overruled, plaintiff appearing by Clarence M. Boyle, City Attorney, J. Dean Barline, Assistant City Attorney, and E. K. Murray, Special Counsel, its attorneys, defendants J. Ralph Williams, Robert L. Fox, Chester C. Paulsen and E. R. McKee appearing by Copeland & Tollefson, their attorneys, defendants Robert Schoettler, as Director of Fisheries, and John A. Biggs, as Director of Game, of the State of Washington, appearing by Donald W. Eastvold, Attorney General, Harold A. Pebbles, William E. Hicks and Lee Olwell, Special Assistant Attorneys General, their attorneys, and it appearing to the Court that plaintiff duly appealed to the Supreme Court of the State of Washington from such order sustaining the demurrer and the judgment of dismissal, and that said court in that certain cause entitled "The City of Tacoma, a municipal corporation, Appellant, v. The Taxpayers of Tacoma, Washington, Respondents, Robert Schoettler, as Director of Fisheries, and [fol. 64] John A. Biggs, as Director of Game, of the State of Washington, Respondents and Cross-Appellants," Cause No. 32411 of said Court, heretofore filed its opinion reversing such order and judgment, and that the Remittitur of said Court issued in said cause on December 14, 1953 pursuant to such opinion has now been filed herein, and the Court being now duly advised, it is

Ordered that such order sustaining the demurrer of said defendants J. Ralph Williams, Robert L. Fox, Chester C. Paulsen and E. R. McKee to the complaint and the judgment of dismissal entered herein December 15, 1952 be and the same is hereby vacated and set aside. It is further

Ordered that such demurrer be and the same is hereby overruled and defendants allowed ten (10) days to further plead herein if they desire so to do.

Dated at Olympia, Washington, December 30th, 1953.

Charles T. Wright, Judge.

Presented by:

/s/ E. K. Murray, Of Attorneys for Plaintiff.

O. K. as to Form:

/s/ R. W. Copeland, Of Attorneys for defendants, The Taxpayers of Tacoma, Washington.

/s/ Lee Olwell, Of Attorneys for defendants, Robert Schoettler, as Director of Fisheries, and John A. Biggs, as Director of Game, of the State of Washington.

[File endorsement omitted]

[fol. 65] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THURSTON COUNTY

[Title omitted]

ANSWER—Filed January 7, 1954

Come Now, J. Ralph Williams, Robert L. Fox, Chester C. Paulsen and E. R. McKee, representative Taxpayers of the City of Tacoma, and by way of answer and cross-complaint to and against the complaint of the plaintiff, admit, deny and allege as follows:

I.

The allegations contained in Paragraph I of said complaint are hereby admitted.

II.

The allegations contained in Paragraph II of said complaint are hereby admitted.

III.

Answering Paragraph III of said complaint, these answering defendants admit that plaintiff did all of the things therein set forth, but deny that the said ordinance ever has become or now is effective for the reasons as are more particularly set forth in Paragraph III of their cross-complaint herein.

IV.

Answering Paragraph IV of said complaint, these answering defendants state that the matters therein alleged being principally matters of intent of the plaintiff, these answering defendants have no way of knowing whether the [fol. 66] plan proposed by plaintiff will be carried out in all particulars, but do admit that the alleged proposal is embodied in the said ordinance.

V.

Answering Paragraph V of said complaint, these answering defendants deny that the license therein referred to has any legal force and effect. Each and every other allegation of fact contained in said paragraph is hereby admitted.

VI.

The allegations contained in Paragraph VI of said complaint are hereby admitted.

VII.

Answering Paragraph VII of said complaint, these answering defendants admit that under the ruling of the Supreme Court of the State of Washington, upon an appeal from an order of the Superior Court, sustaining the demurrer of these answering defendants to this complaint, it has been decided that the provisions of Chapter 9, Laws of 1949, are inapplicable as a restraint to the plaintiff herein. Each and every other allegation therein contained is hereby expressly denied.

VIII.

The allegations of Paragraph VIII of said complaint, subject to the affirmative pleading hereinafter set forth with respect thereto, are hereby admitted.

And for a further, and *affirmative defense to said complaint and by way of cross-complaint against plaintiff,* these answering defendants complain and allege as follows, to-wit:

I.

That pursuant to the allegations contained in Paragraph VIII of plaintiff's complaint, these additional defendants, herein named, were appointed by the Superior Court of the [fol. 66] State of Washington, for Pierce County, where this action was initially filed, to represent all of the taxpayers of the City of Tacoma, and that they do now appear in this action in such representative capacity on behalf of all of the taxpayers of the City of Tacoma, and pursuant to the order of said Superior Court made and entered on the 8th day of February, 1952.

II.

That after their appointment these answering defendants employed the services of R. W. Copeland to act as attorney for the taxpayer defendants herein. That pursuant to the provisions of Rem. Rev. Stat. of Washington, Section 5616-11 et seq., as referred to in Paragraph VIII of plaintiff's complaint, the attorney employed by the defendant taxpayers should be allowed by the Court reasonable compensation for his services herein, to be paid by the plaintiff.

III.

That the ordinance of the plaintiff, dated January 9, 1952, numbered 14386, as referred to in Paragraph III of the plaintiff's complaint is invalid and the contemplated development and construction of the two dams referred to in Paragraph IV of the plaintiff's complaint, pursuant to the plan referred to in said ordinance is illegal and

unlawful for the following reasons and upon the following grounds:

(1) In that the City Council of the City of Tacoma, in passing said ordinance did not follow the wishes of the majority of the voters and taxpayers of said municipality, and said City Council were guilty of arbitrary and capricious action in the following particulars:

(a) In that said City Council used profits and surpluses and proposes to further use profits and surpluses of the [fol. 68] City Light Department for the purposes of extension of capital investment instead of using them for the purpose of general operating expenses, and that in order to provide additional surplus revenues for such capital outlays the City Council not only failed to reduce its rates for electrical power but in fact increased the charges to the taxpayers therefore;

(b) In that said City Council passed said ordinance for the construction of said dams when due to a constant supply of low grade and low cost coal in the State of Washington, they well knew that the Light Department of the City of Tacoma could and can supply the increased needs of the foreseeable users in Tacoma for the next decade or longer by the construction of steam plants to generate electric power during periods of peak demand, at a substantial overall saving in the cost of construction and operation;

(c) In that the said City Council passed said ordinance in willful disregard of then available pertinent information and data indicating that there was and would be available an adequate source of electrical power within the area, and available to the City of Tacoma, within the time limits fixed by the federal license referred to in said complaint, without there being any reasonable need or necessity to construct the dams contemplated by said ordinance, and, at a cost to the taxpayers, substantially less than the cost of producing electrical energy by means of the dams contemplated by said ordinance;

(d) In that said City Council passed said ordinance in willful disregard of pertinent data and information then

available to them, in complete and willful disregard of known construction cost tendencies, and in complete and willful disregard of other known plans with respect to the use of so-called surplus funds of the City Light Department, and by said ordinance provided for the construction of said dams by in part using surplus funds of the Public Utilities Department of the City of Tacoma well knowing [fol. 69] that it was then intended to divert said funds into other capital outlay, and providing for the further financing of said project by the issuance of utility bonds in a sum not to exceed $146,000,000 when they well knew that by the time construction could reasonably be undertaken the cost of such construction would be in excess of $175,000,000;

(e) In that said City Council passed said ordinance for the construction of said dams after being fully advised and well knowing, but in complete disregard of such information and knowledge, that rapid strides were being made in the application of atomic power to the generation of electrical energy, and that the location of atomic energy developments within the State of Washington would in reasonable likelihood make the advent of atomic power for generating electrical current not only feasible but in great probability financially advisable within the period of time required to finance and build the dams so authorized.

IV.

That if the plaintiff is permitted to proceed with the construction of the proposed dams referred to in said complaint, the taxpayers of the City of Tacoma will have imposed upon them unnecessary, unreasonable and unlawful expenses for the construction of said dams, and these defendants and others so situated do not have and will not have in the future any plain, speedy or adequate remedy at law.

V.

That notwithstanding the pendency of this action and the arbitrary and capricious action of the council in passing said ordinance, the plaintiff has expended a substantial

sum of money in anticipation of the construction of said dams, having expended up to and including the 30th of September, 1953 the sum of one million ($1,000,000.00) dollars or more, and if plaintiff is permitted to proceed with further development or construction of said proposed [fols. 70-71] dams it will continue to expend substantial sums of money therefore, all of which expenditures were and are in the opinion of these answering defendants so unreasonable and economically unsound as to constitute arbitrary and capricious action on the part of said City Council.

Wherefore, these answering defendants respectfully pray that the aforementioned Ordinance No. 14386 of the plaintiff City of Tacoma be adjudged invalid, illegal and unlawful, and that the plaintiff take nothing by its complaint, and that the plaintiff be restrained and enjoined from any expenditures for the purpose of developing and for constructing the two dams mentioned in its complaint, and from developing or constructing any other projects that might be attempted thereunder; and that these defendants and all others similarly situated, and for whom these defendants are representatives, be accorded such other and further relief as is appropriate and proper under the laws applicable to this proceeding and as to the Court may seem just and equitable in the premises.

/s/ R. W. Copeland, Attorney for Defendants Taxpayers of the City of Tacoma, Office and Post Office Address: 814 Rust Building, Tacoma, Washington.

Duly sworn to by J. Ralph Williams, jurat omitted in printing.

[File endorsement omitted]

[fol. 72] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

DEMURRER TO ANSWER AND CROSS-COMPLAINT OF DEFENDANT TAXPAYERS—Filed April 14, 1954

Comes now the plaintiff above named and demurs to the affirmative defense and cross complaint of the defendants J. Ralph Williams, Robert L. Fox, Chester C. Paulsen and E. R. McKee, representative Taxpayers of the City of Tacoma, upon the ground that the same does not constitute a defense or counterclaim herein or state facts sufficient to constitute a defense to the complaint or proper counter-complaint in this action, or such as to entitle the defendants to any relief herein.

Clarence M. Boyle, City Attorney, J. D. Barline, Assistant City Attorney, E. K. Murray, Special Counsel, Attorneys for Plaintiff.

Proofs of service (omitted in printing).

[fol. 73] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

ORDER SUSTAINING DEMURRER TO AMENDED CROSS COMPLAINT OF DEFENDANT DIRECTORS—April 14, 1954

This matter having regularly come on for hearing this day upon plaintiff's demurrer to the amended cross complaint of the defendants Robert Schoettler, as Director of Fisheries, and John A. Biggs, as Director of Game, of the State of Washington, plaintiff appearing by Frank Bannon, Assistant City Attorney, and E. K. Murray, spe-

cial counsel, said defendants appearing by Donald W. Eastvold, Attorney General, and Bernard G. Lonctot, Chief, Assistant Attorney General, and the Court being duly advised, it is

Ordered that plaintiff's demurrer to the amended cross complaint of said defendants be and the same is hereby sustained and said defendants allowed 10 days to further plead herein if they desire so to do.

Dated at Olympia, Washington, April 14, 1954.

Charles T. Wright, Judge.

Presented by:

.....

Of Attorneys for Plaintiff

O.K. as to Form:

Bernard G. Lonctot, Of Attorneys for Defendants.

[fol. 74] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

ORDER SUSTAINING DEMURRER TO AFFIRMATIVE DEFENSE AND CROSS COMPLAINT OF DEFENDANT TAXPAYERS—April 29, 1954

This matter having regularly come on for hearing this day upon plaintiff's demurrer to the affirmative defense and cross complaint of the defendants J. Ralph Williams, Robert L. Fox, Chester C. Paulson and E. R. McKee, representative taxpayers of the City of Tacoma, plaintiff appearing by Frank Bannon, Assistant City Attorney, and E. K. Murray, Special Counsel, defendants appearing by R. W. Copeland, their attorney, and the Court being duly advised, it is

Ordered that plaintiff's demurrer to the affirmative defense and cross complaint of said defendants be and the same is hereby sustained and said defendants allowed 5 days to further plead herein if they have any further defense to assert herein.

Dated at Olympia, Washington, April 29th, 1954.

Charles T. Wright, Judge.

Presented by:

E. K. Murray, Of Attorneys for Plaintiff.

OK as to form:

/s/ R. W. Copeland, Attorney for Defendant Taxpayers.

[fol. 75] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

PETITION FOR FIXING COSTS TO BE ALLOWED DEFENDANT TAXPAYERS AS ATTORNEY'S FEES AND TERMINATING LIABILITY FOR ANY FURTHER SERVICES THEREOF—Filed April 29, 1954

The petition of plaintiff respectfully represents:

Plaintiff instituted this action pursuant to the provisions of R.C.W. 7.24.010 et seq. relating to declaratory judgments for the purpose of testing and determining plaintiff's right to issue and sell bonds as proposed in its Ordinance No. 14386 for construction of a power project on the Cowlitz River in Lewis County, Washington, and particularly to determine whether the provisions of Chapter 9, Laws of Washington, 1949, or any other law of the State of Washington, was or is a bar to the issuance and sale of such bonds and the construction of such project. Such a determination was desired as a prerequisite to obtaining an approving opinion of bond attorneys on such bond issue.

The facts set forth in the complaint, including the corporate existence of plaintiff, the official capacity of the Defendant Directors of Fisheries and Game, the passage and publication of plaintiff's Ordinance No. 14386 and its provisions, the issuance to and acceptance by plaintiff of the Federal Power Commission License for construction and operation of such project, the Findings, Conclusions and Order of said Commission and the provisions thereof, and the provisions of the State laws in question, are all matters of public record of which all parties hereto [fol. 76] are charged with notice and have cognizance.

The defendant taxpayers were appointed to act in a representative capacity herein pursuant to the provisions of R.C.W. 7.24.160, and their authority to employ counsel at the cost of plaintiff is limited to the determination and declaration of the particular rights, status and other legal relations specified in said statute, and does not extend to facts and issues subject to determination in an ordinary suit at law calling for executory relief.

At the inception of this action the defendant taxpayers demurred to the complaint, thereby raising all questions proper for presentation and determination herein, and with the defendant Directors of Fisheries and Game contended that said Chapter 9, Laws of Washington, 1949 (the so-called Fish Sanctuary Act), and (under the heading of other laws) that plaintiff's failure to obtain a hydraulics permit from the State as provided by Section 46, Chapter 112, Laws of Washington, 1949, and to obtain approval of plans and specifications for the handling of fish from the defendant Directors of Fisheries and Game as provided by Section 49, Chapter 112, Laws of Washington, 1949, was a bar to the construction of such project and the validity of said Ordinance No. 14386. Upon argument said demurrer was sustained by this Court and this action dismissed.

Thereafter upon appeal by plaintiff to the Supreme Court such ruling and judgment of this Court was reviewed, said acts and each thereof held not to be a bar of such project or render said ordinance invalid, and this cause was remanded to this Court for further proceedings in conformity with the opinion of said Court.

The Supreme Court in its decision determined all the questions and decided all the issues raised by the complaint and proper for determination and declaration in this action, and all questions required by bond attorneys as a prerequisite for an approving opinion, and there remains nothing proper for further proceedings herein ex-
[fol. 77] cept to establish the allegations of the complaint (if denied) and to enter judgment accordingly.

Defendant Taxpayers have now served herein an answer admitting all the allegations of the complaint, except only their legal effect (which is established by said Supreme Court's decision), and to which they add a purported cross-complaint, the entire gravamen of which is that the City Council of plaintiff in passing said Ordinance No. 14386 acted arbitrarily and capriciously in certain claimed respects, and wherein said defendants seek executory relief by way of injunction. All of said respects wherein said defendants claim arbitrary and capricious action on the part of plaintiff's City Council involved matters calling for the exercise of broad legislative judgment and discretion based upon engineering, financial and economic considerations, and the determination thereof by plaintiff's City Council was in accordance with the finding and conclusion of said Federal Power Commission and the advice of plaintiff's engineering, financial and economic consultants, and said defendants' claim of arbitrary and capricious action in connection therewith is wholly sham and frivolous and without any justification or merit whatever.

The controversy which said defendants seek through said cross-complaint to inject in this action involves solely questions of fact and relates only to acts alleged already to have been committed, and for which there exists a remedy at law for which a proceeding for declaratory judgment is not a substitute or alternate, and said defendants are not entitled under R.C.W. 7.24.160 to any allowance for costs for their attorneys' services in asserting or attempting to maintain such cross-complaint, even assuming the same is proper in this action. All services of said attorneys herein properly allowable as costs against plaintiff have been completed.

By reason of the foregoing the costs properly allowable [fols. 78-79] to said defendants for fees for their attorneys herein should now be fixed and determined and plaintiff directed to pay the same, and any liability of plaintiff for costs for services of said attorneys in connection with such cross-complaint or for further services herein disallowed and terminated.

Wherefore, plaintiff prays that such attorneys' fees as costs be fixed and determined and plaintiff directed to pay the same, and any liability of plaintiff for services of said defendants' attorneys in connection with said cross-complaint or for further services herein be disallowed and terminated, and for such other and further relief as to the Court may seem just and proper in the premises.

Clarence M. Boyle, City Attorney, Frank L. Bannon, Assistant City Attorney, E. K. Murray, Special Counsel, Attorneys for Plaintiff.

Duly sworn to by Harold M. Tollefson, jurat omitted in printing.

Proofs of service (omitted in printing).

[fol. 80] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THURSTON COUNTY

[Title omitted]

ANSWER TO PLAINTIFF'S PETITION REQUESTING THE FIXING OF ATTORNEY'S FEES AND THE TERMINATION OF THEIR SERVICES—Filed April 29, 1954

Come Now the defendant representative taxpayers, J. Ralph Williams, Robert L. Fox, Chester C. Paulson and A. R. McKee, and by way of answer to the petition of the plaintiff City of Tacoma, and by way of cross-petition, admit, deny and allege as follows:

The facts set forth in the first and second paragraphs of the City of Tacoma's petition are admitted.

It is admitted that the defendant taxpayers were appointed to act as representatives of the taxpayers of the City of Tacoma, generally, pursuant to the provisions of R.C.W. 7.24.180, and that by the terms of that statute they were authorized to employ counsel at the expense of plaintiff City. Defendant taxpayers are not certain as to how far they are authorized or required to go in defending this action, nor consequently how far they should go in having counsel represent them in this regard, at the expense of plaintiff City of Tacoma. That defendant taxpayers do not desire to continue this case beyond the steps contemplated by statutes involved and do not desire to incur any personal liability for the services of counsel. That the plaintiff City of Tacoma should compensate the [fol. 81] counsel employed by defendant taxpayers for all of the services rendered to date, including the preparation of this answer and any hearings incidental to the determination of this matter as brought on by said petition and this answer and cross-petition, and for any services that may be rendered hereafter by virtue of any specific and direct order of the Court herein.

Defendant taxpayers admit all of the matters alleged in the third and fourth paragraphs of plaintiff City's petition except as herein before set forth, and except as to the conclusion pleaded by plaintiff City that "their demurrer raised all questions proper for presentation and determination herein" these defendants hereby submitting to the Court the determination as to whether they have raised all such matters.

The matters set forth in the fifth paragraph of the petition of plaintiff City are admitted.

The matters set forth in paragraph six of the plaintiff City's petition are essentially correct, except that these defendant taxpayers do not feel competent to admit or finally decide that the decision of the supreme court "determined all the questions and decided all the issues raised by the complaint and proper for determination and declaration in this action," and of course these defendants have no accurate knowledge as to the matters required by bond attorneys for the rendering by them of an opinion, nor do they consider these matters material to the issues

herein, nor do defendant taxpayers feel competen
finally admit or decide that "nothing proper for fu
proceedings herein except to establish the allegatio
the complaint and enter judgment accordingly" rema
be done.

With respect to the seventh paragraph of plaintiff C
petition these defendant taxpayers admit that, for
[fol. 82] purposes as hereinafter shown by their c
petition, they filed and served an answer and cross-
plaint, alleging generally that the former and the
duly elected and acting council of plaintiff City acte
an arbitrary manner in passing the subject ordinance
respect to certain matters which did however call fo
exercise of legislative judgment. Defendant taxpa
however are in no position to and cannot admit tha
determination of these matters by the then acting
Council was in accordance with the findings and co
sions of the Federal Power Commission and they expr
deny that their claim of arbitrary action of and by
said City Council is wholly or even in part sham and f
lous and without any justification whatsoever. In
regard defendant taxpayers allege that they individ
and collectively have information and knowledge w
has led them to reasonably believe that the then a
City Council did act in an absolutely arbitrary ma
but these defendant taxpayers do not know whether
proper or not to raise such issue in this proceeding.

The matters set forth in paragraph eight of the pet
of the plaintiff City squarely raise the matters which
defendants feel should be decided by this Court, and
defendant taxpayers do therefore respectfully cross
tion the Court by setting forth the following:

These defendant taxpayers were appointed by the C
to represent all of the taxpayers of the City of Taco
this suit having to do generally with the question o
legality of the building of a power project comm
referred to as "The Cowlitz Dams" which is a matte
has created a great deal of interest on the part of Ta
taxpayers generally, some of whom take one side o
general issues and some of whom take the other.
defendant taxpayers did not commence this actio

[fol. 83] did they seek appointment as the representative defendants herein, although when appointed they were willing to so serve and have throughout said proceedings done so in good faith and with every intention to vigorously contest said action, but with no desire to engage in improper or unnecessary litigation. That having acted in good faith throughout the proceedings these defendant taxpayers do not want to be subjected to criticism by any substantial group of taxpayers of the City of Tacoma who might feel that these representatives have not pursued this defendant proceeding with all possible vigor, nor do they want to be subjected to criticism of a group of taxpayers of said City who might feel that they have belabored the defense of this action.

In this regard, it is the opinion of these taxpayers that this being a suit brought for a declaratory judgment, by the plaintiff City, that they have done all that was expected of them in the way of a defense to the action. They have however, prepared, served and filed herein an answer and cross-complaint for the purpose of showing to the Court the only further position they can take, if the same is a proper one to take, so that the Court may be fully advised in determining whether these defendant representative taxpayers should be directed to proceed further, or whether their answer and cross-complaint should be ordered stricken and then judgment entered on behalf of plaintiff as prayed for in their petition.

In the event the Court determines that defendant taxpayers have fulfilled their duties and should not proceed further, then these defendants join with plaintiff City of [fol. 84] Tacoma in asking that the Court now determine the costs and reasonable attorney's fees to be allowed defendant taxpayers and their attorney herein, and that a date be fixed for the hearing of evidence and the determination thereof.

Wherefore, defendant taxpayers pray that the Court read, examine and consider the petition of the City of Tacoma, this answer and cross-petition of the defendant taxpayers, and that the Court then determine whether the defendant taxpayers have fulfilled the duties required of them by the statutes under which this action was com-

menced, and that by order of the Court these defendants be directed either to proceed further with said cause, or that their answer and cross-complaint be stricken, or that they be ordered to proceed no further, as the Court, in its sound discretion may determine to be most proper, and that in the event the Court determines that these defendants shall proceed no further, that the Court fix a time and place for the hearing of the matter of the fixing of reasonable attorney's fees and the settlement of allowable costs.

Duly sworn to by J. Ralph Williams, jurat omitted in printing.

R. W. Copeland, Attorney for Defendant Taxpayers.

Proof of service (omitted in printing).

[fol. 85] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THURSTON COUNTY

[Title omitted]

SECOND AMENDED ANSWER AND CROSS COMPLAINT—
Filed April 29, 1954

Come now the defendants, Robert Schoettler as Director of Fisheries, and John A. Biggs, as Director of Game of the State of Washington, and by way of answer and cross-complaint to and against the complaint of the plaintiff, admit, deny, and allege as follows:

I.

The allegations contained in Paragraph I of said complaint are hereby admitted.

II.

The allegations contained in Paragraph II of said complaint are hereby admitted.

III.

Answering Paragraph III of said complaint, these answering defendants admit that plaintiff did all of the things therein set forth, but allege that the said ordinance is now inapplicable because of a change in construction costs and conditions.

IV.

Answering Paragraph IV of said complaint, these answering defendants state that the matters therein alleged being principally matters of intent of the plaintiff, these answering defendants have no way of knowing whether the plan proposed by plaintiff will be carried out in all particulars, but do admit that the alleged proposal is embodied in the said ordinance, and allege that the said ordinance [fol. 86] is now inapplicable because of a change in construction costs and conditions.

V.

Answering Paragraph V of said complaint, these answering defendants admit that the plaintiff made application for a license to the Federal Power Commission as described therein, but deny each and every other allegation of fact contained in said paragraph.

VI.

The allegations contained in Paragraph VI of said complaint are hereby admitted.

VII.

Answering Paragraph VII of said complaint, these answering defendants admit that under the ruling of the Supreme Court of the State of Washington, upon an appeal from an order of the Superior Court, sustaining the demurrer to said complaint, it has been decided that the provisions of Chapter 9, Laws of 1949, are inapplicable as a restraint to the plaintiff herein. Each and every other allegation therein contained is hereby expressly denied.

VIII.

Answering Paragraph VIII of said complaint, these answering defendants alleged that the said paragraph is not a statement of facts, but rather a prayer, and for this reason denies that it is an allegation of fact.

And for a further, and affirmative defense to said complaint and by way of cross-complaint against plaintiff, these answering defendants complain and allege as follows, to-wit:

I.

That the Cowlitz River in Lewis County, Washington, at River Mile 65, known as the Mossyrock Site, and at River Mile 52, known as the Mayfield Site, is non-navigable.

II.

That the waters at the above mentioned points are the property of and are under the jurisdiction of the State of Washington.

[fol. 87]

III.

That plaintiff's (sic) propose to construct a dam at the Mayfield Site and a dam at the Mossyrock Site on the said Cowlitz River without obtaining from the State of Washington the approval, permits and licenses as required by existing law.

IV.

That if the City of Tacoma proceeds to construct the aforesaid dams, it will seriously and irreparably damage and injure the State of Washington and the fishing resources of this state.

Wherefore, these answering defendants respectfully pray that the proposed actions of the plaintiffs be adjudged unlawful, and that the plaintiffs be restrained and enjoined from developing and constructing the two dams mentioned in its complaint, that the proposed bond issue be declared invalid, and that the State of Washington be accorded such

other and further relief as is so appropriate and proper under the laws applicable to this proceeding and as to the Court may seem just and equitable in the premises.

Don Eastvold, Attorney General, Glenn E. Thomson, Assistant Attorney General, Richard F. Broz, Assistant Attorney General.

[fol. 88] *Duly sworn to by Robert Schoettler and John A. Biggs, jurats omitted in printing.*

[fol. 89] Proof of service (omitted in printing).

[fol. 90] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

DEMURRER TO SECOND AMENDED AFFIRMATIVE DEFENSE AND CROSS-COMPLAINT OF DEFENDANT DIRECTORS— filed May 7, 1954

Comes now plaintiff and demurs to the second amended affirmative defense and cross-complaint of the defendants Robert Schoettler, as Director of Fisheries, and John A. Biggs, as Director of Game, of the State of Washington, upon the grounds that the same does not state facts sufficient to constitute a defense to the complaint or a cross-complaint in this action for a declaratory judgment, or such as to entitle said defendants to any declaratory relief herein.

Clarence M. Boyle, City Attorney; Frank L. Bannon, Assistant City Attorney; E. K. Murray, Special Counsel, Attorneys for Plaintiff.

Proof of service (Omitted in printing).

[fol. 91] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

REPLY TO SECOND AMENDED AFFIRMATIVE DEFENSE AND CROSS-COMPLAINT OF DEFENDANT DIRECTORS— filed May 7, 1954

Comes now plaintiff, and for the purpose of expediting disposal of this cause, and without waiving its position that its demurrer to the second amended affirmative defense and cross-complaint of the defendants Robert Schoettler, as Director of Fisheries, and John A. Biggs, as Director of Game, of the State of Washington, is well taken and should be sustained, for reply to said affirmative defense and cross-complaint:

I.

Denies the allegations and legal conclusions contained in paragraphs I, II, III and IV of said affirmative defense and cross-complaint, and in respect thereto alleges that the construction and operation of the project described in plaintiff's complaint will affect public lands or reservations of the United States, and the navigable capacity of the Cowlitz River, and the interests of interstate or foreign commerce, and that the waters of said river at the site of said project are under the jurisdiction of the Federal Power Commission of the United States, and that no permit or license therefor from the State agencies alleged are required.

And for a first affirmative defense to said second amended [fol. 92] *affirmative defense and cross-complaint, plaintiff alleges:*

I.

That such affirmative defense and cross-complaint does not state facts sufficient to constitute a defense to plain-

tiff's complaint nor to constitute a proper counter claim or cause of action against plaintiff for declaration of rights, status or other legal relations.

II.

That said second amended affirmative defense and cross-complaint are based upon contentions and assertions contrary to the law of this case as decided on October 14, 1953, in the Supreme Court of this State on prior appeal in this cause (143 Wash. Dec. 793).

And for a second affirmative defense to said second amended affirmative defense and cross-complaint, plaintiff alleges:

I.

That such cross complaint does not seek a declaration of rights, status or other legal relations between said defendants and plaintiff, but instead seeks executive relief based upon acts alleged to have already happened or to have been committed, and is not proper or authorized under the provisions of R.C.W. 7.24.010 et seq. relating to declaratory judgments.

II.

That all matters upon which plaintiff sought a declaration of rights, status or other legal relations in the complaint herein have been declared and determined by the Supreme Court of the State of Washington upon appeal in this cause, and there remains no proper further issue for declaration or determination herein.

III.

That the matters set forth in such affirmative defense and counterclaim are sham and frivolous and incompetent, [fol. 93] irrelevant and immaterial upon the proper issues of this cause, and are wholly without merit.

And for a third affirmative defense to said second amended affirmative defense and cross-complaint, plaintiff alleges:

I.

That all the matters set forth and all the issues raised by said defendants in said second affirmative defense and cross-complaint were litigated and have been decided adversely to said defendants in that certain proceeding before the Federal Power Commission entitled "In the Matter of the City of Tacoma, Washington", Docket No. E6156. of said Commission, as shown by the Findings and Order dated March 8, 1949, of said Commission, a copy of which is attached to the complaint herein and marked Exhibit B, and further in that certain proceeding in which said defendants were parties before said Commission entitled "In the Matter of City of Tacoma, Washington", Project No. 2016 of said Commission, as shown by the Opinion, Findings, Order and License of said Commission in said proceeding dated November 28, 1951, copies of which are attached to the complaint herein and marked Exhibit "C", "D" and "E", and as further decided and adjudicated on review taken by said defendants of said Order and Findings by the United States Court of Appeals for the Ninth Circuit by decision dated October 5, 1953, (207 Fed. (2d) 391) in that certain cause entitled "State of Washington Department of Game; State of Washington Department of Fisheries; and Washington State Sportsmen's Council Inc., a corporation, Petitioners, vs. Federal Power Commission, Respondent, City of Tacoma, Washington, Intervener", cause No. 13,289 of said Court (Certiorari denied by U.S. Supreme Court April 5, 1954, 98 L. Ed. 513).

Wherefore, plaintiff prays for judgment as prayed for in its complaint, and further that such so-called affirmative defense and cross-complaint of said defendants be dismissed, and that plaintiff have and recover from said [fol. 94] defendants its costs and disbursements herein relating to such affirmative defense and cross-complaint,

and for such other and further relief as to the Court may seem just.

Clarence M. Boyle, City Attorney; Frank L. Bannon, Assistant City Attorney; E. K. Murray, Special Counsel, Attorneys for Plaintiff.

Duly sworn to by Harold M. Tollefson, jurat omitted in printing.

Proof of service (Omitted in printing).

[fol. 95] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

ORDER RELATING TO TAXATION OF DEFENDANT TAXPAYERS' ATTORNEY'S FEES AS COSTS HEREIN—April 2, 1954

This matter by consent having regularly come on for hearing this day upon plaintiff's petition for fixing and terminating plaintiff's liability for costs for defendant taxpayers' attorney's fee herein, and on the answer and cross petition of said defendants requesting the Court's instructions with reference thereto, plaintiff appearing by Frank Bannon, Assistant City Attorney, and E. K. Murray, Special Counsel, its attorneys, said defendants appearing by R. W. Copeland, their attorney, and the Court having considered said petition and answer and cross petition and the record herein and the statements of counsel with reference thereto, and being of the opinion that the position taken by plaintiff in its petition is correct, and that the Supreme Court in its decision upon the appeal heretofore taken herein has determined all the questions and decided all the issues proper for determination herein, and that the affirmative defense and cross complaint of said defendants filed herein involves solely questions of fact and relates only

to acts alleged already to have been committed and for which there exists a remedy at law for which a proceeding for a declaratory judgment is not a substitute or an alternate, and that the assertion of such affirmative defense and cross complaint is not proper in this action, and the [fol. 96] Court having heretofore entered its order sustaining plaintiff's demurrer to said affirmative defense and cross complaint, and said defendants having advised the Court that in their opinion they have done all that was or can be expected of them in the way of defense to this action, and that they have nothing further to offer in the way of defense thereto or further prosecution thereof, and both plaintiff and defendants having requested that the liability of plaintiff for further costs for attorney's fees of said defendants herein and the responsibility of said defendants for further attempt at defense herein be determined, and the Court being now duly advised in the premises it is

Ordered that said defendants be and they are hereby absolved from any further defense or prosecution of this action, and it is further

Ordered that the liability of plaintiff for costs for any further or additional services of the attorney for said defendants be and the same is hereby terminated, and it is further

Ordered that a hearing for fixing and determining the costs to be allowed said defendants herein for attorney's fees and other court costs be and the same is hereby fixed for such other time as may be mutually agreed upon between the Court and counsel.

Dated at Olympia, Washington, April 29d, 1954.

Charles T. Wright, Judge.

Presented by:

E. K. Murray, Of Attorneys for Plaintiff.

OK as to form:

/s/ R. W. Copeland, Attorney for Defendant Taxpayers.

Filed: Apr 29 10 02 AM '54

[fol. 104] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER AND INJUNCTION PENDENTE LITE—filed June 24, 1955

Comes now the defendants, the Directors of Fisheries and Game of the State of Washington, acting for and on behalf of the State of Washington, and move the Court to make an order directing the plaintiff City, Mayor Harold Tollefson of said City, the City Council, the other officers and agents of said City, and each of them, to show cause at a time and place appointed in such order why they and each of them should not be enjoined and restrained during the pendancy (sic) of this action from developing, constructing, or contracting for or permitting any bidders from constructing or continuing the construction of two dams on the Cowlitz River which are mentioned in the accompanying affidavit, and also from delivering or permitting the sale of any bonds for the payment of costs of said development; that a temporary restraining order also be granted the defendants herein enjoining and restraining said plaintiff, its officers and agents, and each of them, until the hearing upon such order to show cause, from doing or permitting the doing or continuation of any of the acts mentioned above; that upon the hearing of this order to show cause, a preliminary injunction be granted the defendants herein to enjoin the plaintiff from the doing or permitting the [fol. 105] doing or continuation of the above acts during the pendency of this action. This motion is based on the following grounds and the facts set forth in the accompanying affidavit:

1. That this action has been brought by the plaintiff to determine plaintiff's right to construct two dams on the Cowlitz River and to issue and sell bonds for the payment thereof; that the defendants, acting for and on behalf of the State of Washington, by way of affirmative defense and cross-complaint, have asked that the plaintiff be enjoined from constructing the dams and selling the bonds for the

reason that plaintiff, a limited arm of the state, is precluded from accomplishing said acts under the laws of the State of Washington.

2. Bids for the purchase of the bonds were awarded June 21, 1955, and Tacoma theatens (sic) to deliver said bonds to the purchasers in the immediate future; contracts for the construction of the dams were awarded June 22, 1955, and Tacoma theatens (sic) to authorize the commencement of construction in the immediate future.

3. If the threatened acts of the plaintiff are not enjoined pending the outcome of this action, irreparable injury will result to the State of Washington in that part or all of the fish runs in the Cowlitz River will be destroyed for which adequate damages cannot be ascertained, and the public will suffer irreparable harm if invalid bonds are permitted to be sold.

This motion is based upon the allegations of defendants' cross complaint in the above action and upon the accompanying affidavit.

Don Eastvold, Attorney General, Joseph T. Mijich, Assistant Attorney General, Richard F. Broz, Assistant Attorney General, E. P. Donnelly, Assistant Attorney General, Attorneys for defendants.

[File endorsement omitted]

[fol. 106] AFFIDAVIT OF JOSEPH T. MIJICH

Joseph T. Mijich, being first duly sworn, on oath, deposes and says:

That he is an Assistant Attorney General of the State of Washington and one of the attorneys in the above action, and makes this affidavit on information and belief in support of the points and authorities submitted to the Court on this motion.

1. That on or about the 6th day of February, 1952, the City of Tacoma, as plaintiff, filed in the Superior Court of Pierce County, Cause No. 115209, an action in which the

Directors of Fisheries and Game in their official capacities, acting for and on behalf of the State of Washington, were made defendants for the purpose of determining the City's right to construct two power dams on the Cowlitz River and to issue and sell bonds to pay for such construction. That said action was transferred to Thurston County, which is this action pending herein, and from which a ruling on demurrer was appealed to the Supreme Court, the opinion of that Court being found in 43 Wn. (2d) 468.

In accordance with said opinion, the said case has been sent back to this Court for trial on the merits, which is [fol. 107] the present action now pending, and in which no decision on the merits has been made as to any questions between the plaintiff City and the defendant Directors, representing the State of Washington. That this action now pending requires the plaintiff to prove the allegations in its complaint, and further issues are raised in defendants' cross complaint which alleges that plaintiff is precluded under the laws of the State of Washington from constructing the dams and issuing and selling bonds.

2. That in the opinion of the affiant, the following facts give rise to questions which must be determined in this Court before the plaintiff may proceed to construct the dams and to issue and sell bonds therefor.

A. The last paragraph of Section 2 (g) of Tacoma's ordinance No. 14386, attached to the complaint in this action, which ordinance authorizes the construction of the Mayfield and Mossyrock Dams on the Cowlitz River, reads as follows:

> "The construction of the project has been licensed by the Federal Power Commission under Project No. 2016, and the construction herein authorized *shall conform with the requirements of such license.*" (Emphasis supplied)

Article 28 of said license requires that Tacoma shall complete the project works in thirty-six months. Affiant is informed and believes that it is impossible for the City of Tacoma to complete both dams in thirty-six months. In fact, the City of Tacoma has made application before

the Federal Power Commission, dated June 2, 1955, to extend the period of construction to six years after the commencement of construction. Tacoma has also asked the Commission to reduce the minimum flow requirements under Article 35 (a) and (b) of the license. These applications have not been granted by the Commission. Therefore, Tacoma is presently proceeding contrary to the Federal Power Commission license, contrary to its own city ordinance, and therefore, contrary to state law.

B. Section 2 (g) of ordinance No. 14386 authorizes the [fol. 108] City to condemn certain described property on which the two dams with their reservoirs are to be built. A large portion of Primary State Highway No. 5 is included in this property. To meet the requirements of the license and its ordinance, Tacoma must condemn a large portion of this highway, which will be inundated, being state land segregated from the public domain and already appropriated to a public use. The City has not obtained the required approval by certain state officials under R.C.W. 90.28.010, and since such authorization has not been made, the ordinance authorizing such condemnation is void, and therefore, Tacoma, being a limited arm of the state government, is proceeding contrary to the laws of the State of Washington. The City has apparently taken no steps whatever to comply with R.C.W. 90.28.010.

C. Ordinance No. 14386 authorizes the condemnation of the state game hatchery, known as the Mossyrock Hatchery, located on the Cowlitz River. This hatchery is located on Government Lots 4, 7, 8, and 9, Section 11, Township 12 North, Range 2 East Willamette Meridian, in Lewis County, Washington. The state also has a water right there. The reservoir created by the Mayfield Dam will inundate and overflow the entire hatchery. This hatchery site has been segregated from the public domain and already appropriated to a public use.

The City of Tacoma, being a limited arm of the state government, cannot condemn property such as this already dedicated to a public use. *State* v. *Superior Court,* 91 Wash. 454, 157 Pac. 1097 (1916). Therefore, the ordinance authorizing such condemnation is invalid and the City is

proceeding contrary to the laws of the State of Washington. Affiant alleges that no agreement between the City of Tacoma and state authorities has been reached, and that legislative action will be necessary before Tacoma can build the project. There has been no such legislative action as yet.

D. The City of Tacoma has obtained no permit from [fol. 109] the Supervisor of Water Resources for the construction of said dams. Should the City of Tacoma construct such dams without the approval or authority of the Supervisor of Water Resources, the same would be subject to abatement as a public nuisance under R.C.W. 90.28.060. Tacoma has already failed to compel the Director of the Department of Conservation and Development to issue a final permit for part of this project. See *State ex rel. Tacoma* v. *Rogers,* 32 Wn. (2d) 729, 203 P. (2d) 325 (1949).

E. That in addition to the Fish Sanctuary Act, Chapter 9, Laws of Washington for 1949, which would prevent the construction of a dam over 25 feet in heighth, (sic) there has to be considered the Oregon-Washington Compact, contained in Section 20, Chapter 188, General Laws of Oregon for 1915, and Section 116, Chapter 31, Laws of Washington for 1915, which were ratified by the 65th Congress on April 8, 1918. See 40 Statutes at large, Chapter 47. The City of Tacoma's action in attempting to construct two dams on the Cowlitz River, a tributary of the Columbia River, is in direct violation of said Compact.

F. Tacoma attempted to bring eminent domain proceedings in Federal Court under the authority of the Federal Power Act. *City of Tacoma* v. *Severns, et al.,* United States District Court No. 1892. The State of Washington and also Lewis County, owning land to be inundated by the dam, moved to dismiss the action on the ground that Tacoma, being a creature of the State, was required under Article XI, Section 10, of the State Constitution to comply with State laws, and state law did not permit condemnation in Federal Court. On June 18, 1955, Judge Boldt granted the State's and County's motion saying that "The federal government does not have authority to remove limitations on the powers of Washington cities expressly provided by

the legislature of that sovereign state." That is precisely what the state's position is in this action, that Tacoma, being a creature of the state, is limited by state law from [fol. 110] proceeding with the construction of the dams. The Supreme Court in *Tacoma* v. *Taxpayers,* 43 Wn. (2d) 468, 262 P. (2d) 214 (1953), following this concept, stated that the sanctuary act did not repeal R.C.W. 80.40.050, which permits a city to construct facilities for power purposes. But our Court in construing R.C.W. 80.40.010, a similar statute permitting the construction of water works by a city, stated that the city was still prevented from condemning state land dedicated to a public use, *Tacoma* v. *State,* 121 Wash. 448, 209 Pac. 700 (1922), and that is what the city must attempt to do here before the project can be built. It cannot do so, and therefore, the City's action must fall and the defendants' prayer for injunction must be granted.

3. On June 21, 1955, the City of Tacoma awarded bids for the purchase of Tacoma city Light revenue bonds, totalling $15,000,000, to pay for the construction of part of the Mayfield Dam. Affiant is informed and believes that the City will deliver said bonds to the purchasers in the immediate future; on June 22, 1955, the City of Tacoma awarded the contracts for the construction of the Mayfield Dam, and the City intends to authorize the commencement of said construction in the immediate future.

4. Affiant is informed and believes that if the threatened acts of the plaintiff in delivering the bonds and commencing construction of the Mayfield Dam are not enjoined pending the outcome of this action, irreparable injury will result to the State of Washington in that part or all of the fish runs in the Cowlitz River will be destroyed for which adequate damages cannot be ascertained. Also, if invalid bonds are permitted to be on the market, the public will suffer and it is the responsibility of the State of Washington to prevent this.

Joseph T. Mijich, Assistant Attorney General.

Subscribed and sworn to before me this 23rd day of June, 1955.

Lucy Wolfard, Notary Public in and for the State of Washington, residing at Bellevue.

[fol. 111] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE—June 24, 1955

It appearing to the satisfaction of the Court from the motion of defendants and the attached Affidavit, that this is a proper case for a Temporary Restraining Order, and that unless the Temporary Restraining Order prayed for in said motion be granted, great injury will result to the defendants and the State of Washington before the matter can be heard on notice;

Now, Therefore, It Is Hereby Ordered that said plaintiff, City of Tacoma, its Mayor, Harold Tollefson, its City Council, the other officers and agents of said City, and each of them, appear before this Court at the hour of *10:30 A.M.*, on the *8th* day of August, 1955, then and there to show cause, if any they have, why they and each of them should not be restrained and enjoined during the pendancy (sic) of this action, from developing, constructing, or contracting for or permitting any bidders from constructing or continuing the construction of the Mayfield or Mossyrock Dams in the Cowlitz River, and also from delivering or permitting the sale of any bonds for the payments of costs of said project, in accordance with the prayer in defendants' motion.

And It Is Further Ordered that, pending the hearing of [fol. 112] the order to show cause, you and each of you said plaintiff and its officers and agents mentioned above are hereby restrained and enjoined from developing, constructing, or contracting for or permitting any bidders from constructing or continuing the construction of the Mayfield or Mossyrock Dams in the Cowlitz River, and also from delivering or permitting the sale of any bonds for the payment of costs of said project.

And It Is Further Ordered that a copy of the motion and the attached affidavit herein, together with this order, be served on the City of Tacoma or its authorized representatives.

Done In Open Court this 24th day of June, 1955.

Charles T. Wright, Judge

Presented by:

Joseph T. Mijich, Assistant Attorney General

[File endorsement omitted]

[fol. 113] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

MOTION TO QUASH AND TO DISSOLVE TEMPORARY RESTRAINING ORDER—filed June 28, 1955

Comes now plaintiff and moves that the Temporary Restraining Order and Order to Show Cause, dated June 24, 1955, and entered herein, be quashed and dissolved for the following reasons:

1. Such restraining order was entered herein without notice to plaintiff, and without showing or existence of any emergency therefor, and without any justifiable excuse for such ex parte and precipitous section.

2. Approper (sic) the above, this action has been pending for more than two years, and the defendants directors have long known of plaintiff's contemplated action in calling for bids on contracts and for sale of bonds, and for a year past this action has been awaiting the ruling of this Court upon plaintiff's demurrer to the defendant directors 2nd Amended Cross-Complaint (demurrer to the 1st Amended Cross-Complaint having previously been sustained), and on said defendants' motion to strike from plaintiff's Reply (challenging the sufficiency thereof), both of which matters were submitted to this Court on oral arguments and briefs.

Request is hereby respectfully made for a ruling on these matters as a basis for disposal of the questions thereby raised.

[fol. 114] 3. Further approper (sic) the above, no action is contemplated or will be taken by plaintiff pending this

Court's ruling herein which will interfere with or result in any irreparable injury to the fish runs of the Cowlitz River, and defendants will suffer no irreparable or other damage by reason of the dissolution of said restraining order.

That the license heretofore granted by the Federal Power Commission to the City of Tacoma for construction of the dam on the Cowlitz River contains the following provisions:

"*Article 30.* Before beginning the construction of any permanent fish ladders, fish traps or other fish handling facilities or fish protective devices, the Licensee shall make further studies, tests and experiments to determine the probable effectiveness of such facilities and devices and shall submit plans therefor and obtain Commission approval. In making such studies, tests and experiments and in the preparation of final design plans, the Licensee shall cooperate with the United States Fish and Wildlife Service and the Departments of Fisheries and Game of the State of Washington. The Licensee shall continue its studies and investigations with respect to its proposed program of stream improvement and hatchery facilities. The Licensee shall submit quarterly reports to the Commission of its activities hereunder.

Article 31. The Licensee shall construct, maintain and operate such fish ladders, fish traps or other fish handling facilities or fish protective devices and make such stream improvements and provide such fish [fol. 115] hatcheries and similar facilities and comply with such reasonable modification of the project structures and operation in the interest of fish as may be prescribed hereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior."

That the protection of the fish in the Cowlitz River is a matter for presentation before the Federal Power Commission.

4. This is a special proceeding (to determine and declare the validity of a proposed bond issue) under a special statute (a portion of the Declaratory Judgment Act) for

declaratory relief only; and executory and injunctive relief (and a cross-complaint seeking same) are not warranted or proper herein. A declaratory judgment action is not and cannot be made a substitute or alternate for any common law or other statutory action. The defendant directors were made parties to said special proceeding because the applicability and constitutionality of Chapter 9, Laws of 1949, was involved therein.

5. That all matters proper for determination herein and upon which plaintiff sought a declaratory judgment have been determined and declared by the Supreme Court of this State upon appeal heretofore taken herein (43 Wn. (2d) 468), and this matter is now before this Court with directions under remittur (sic) to proceed in accordance with the opinion of that Court, and there remains no proper further issue for determination herein, except proof of the allegations of the Complaint, and this Court heretofore so found and declared in the order entered herein April 29, 1954, terminating participation in this action by the defendant taxpayers.

[fol. 116] d. (sic) That the defendant directors' 2nd Amended Cross-Complaint (which is the basis of its claim for injunctive relief herein) is founded upon statutes and contentions passed upon and decided by the Supreme Court adversely to said defendants upon the appeal aforesaid, and are contrary to the principles therein enunicated (sic) and the law of this case as thereby established and the directions contained in the remittitur of said Court.

7. That said defendants' 2nd Amended Cross-Complaint does not state facts sufficient to constitute a defense to plaintiff's Complaint, nor to constitute a proper counterclaim or cause of notion (sic) against plaintiff herein, or to entitle said defendants to any relief herein.

8. That all issues raised in said defendants' 2nd Amended Cross-Complaint were litigated between the parties hereto in that certain proceeding before the Federal Power Commission and the Federal Courts, entitled "In the Matter of the City of Tacoma, Washington", Docket No. 2016 of said Commission, and reported on review at 207 Fed. (2nd)

391 (certiorari denied by U.S. Supreme Court April 5, 1954, 98 L. Ed. 513), and are res adjudicata as pleaded and set forth by plaintiff in the third affirmative defense of its Reply to said 2nd Amended Cross-Complaint filed herein.

9. That continuation in force of such restraining order for more than a few days, or for any considerable portion of the period between now and August 8, 1955 (the return date therein specified), will seriously interfere with the orderly preparations for and progress of plaintiff's proposed projects, and may cause plaintiff to lose the benefits of greatly advantageous contracts and be subjected to other large costs, all to plaintiff's possible damage to the extent of several million dollars. That in the public interest and [fol. 117] for the public benefit said Restraining Order should be forthwith dissolved.

10. That prompt hearing hereon within the next three days is hereby respectfully requested.

This motion is based upon the files herein and upon the affidavits filed herewith.

Presented by:

E. K. Murray, Clarence M. Boyle, Frank L. Bannon, Marshall McCormick.

By /s/ Frank L. Bannon, Attorneys for Plaintiff.

[File endorsement omitted]

[fol. 118] AFFIDAVIT OF CARL F. PFLUGMACHER

Carl F. Pflugmacher, being first duly sworn on oath, deposes and says:

That he is an employee of the City of Tacoma, acting in the capacity of Project Engineer for the Cowlitz Power Development and particularly in the construction of the Mayfield Dam and Appurtenances.

That the present construction schedule for the construction of the Mayfield Dam does not contemplate any action that will in any way interfere with the fish runs in the Cowlitz River until the first day of June, 1957.

That on the first day of June, 1957, cofferdams will be placed in the Cowlitz River and the natural flow of the river will be diverted through a diversion tunnel, that on this date provision will have been made for the trapping of any fish ascending the Cowlitz River and for hauling them to points above the cofferdam.

The Affiant knows of his own knowledge that this information has been communicated to Joseph T. Mijich, Assistant Attorney General, during March of 1955 in a meeting attended by said Joseph T. Mijich and the Affiant, among others, held in Washington D. C. at the Federal Power Commission.

Carl F. Pflugmacher, Project Engineer.

Subscribed and sworn to before me this 27 day of June, 1955.

Robert R. Hamilton, Notary Public in and for the State of Washington, residing at Tacoma.

[fol. 119] AFFIDAVIT OF FRANK L. BANNON

Frank L. Bannon, being first duly sworn, on oath, deposes and says:

That he is one of the Chief Assistant City Attorneys of the City of Tacoma and one of the attorneys in the above entitled action, and makes this affidavit in support of the motion heretofore filed to quash and dissolve the Temporary Restraining Order entered on the 24th day of June, 1955.

The affiant incorporates herein all of the facts and material on file in the above entitled matter pertinent to this motion.

That the above cause in the above entitled court was remanded by the Supreme Court of the State of Washington; that the Supreme Court of the State of Washington in 43 Wnd (2d) 468 determined on the issues vital thereto and that the above entitled court in an order dated April 29, 1954 found that all issues necessary for determination in the above entitled matter had been determined by the Supreme Court of the State of Washington that all of the matters of proof set forth in the plaintiff's complaint

are matters which the above entitled court can take judicial notice: that

That answering paragraph 2 of the defendant's affidavit, [fol. 120] notified the Federal Power Commission that they wish a hearing on the amendment asked for by the City of Tacoma and that any objection thereto is a matter to be raised at the Federal Power Commission and not this court.

Answering paragraph 2b, that before proceeding with the condemnation itself it is necessary for the City of Tacoma to pass an ordinance authorizing the City Attorney to proceed with condemnation; that such an ordinance has been passed and that it is not Ordinance No. 14386; when the City of Tacoma takes action to inundate State Highway No. 5, the statutory procedure of R.C.W. 93.28.010 will be followed; that any points to be raised by it will be raised by the Department of Highways and not the Department of Fisheries.

That answering paragraph 2c of the defendant's affidavit, the question of whether or not the City of Tacoma is authorized to condemn State land devoted to a public use is a question for a condemnation suit and not a declaratory judgment determining the validity of bonds.

That answering paragraph 2d of defendant's affiant, the Supreme Court of the State of Washington in 43 Wn. (2d) 468 determined that any laws of the State of Washington in conflict with the laws of the United States Government and the Federal Power Act were null and void insofar as this project is concerned.

Answering paragraph 2e of the defendant's affiant, the affiant points out to the court that the Supreme Court of the State of Washington in 43 Wn (2d) 468 found that Chapter 9 of the laws of 1949 are not applicable to the City of Tacoma and the Cowlitz River dam; that this fact is well known to the defendant's affiant; that in addition thereto [fol. 121] the Oregon-Washington compact has no force and effect in connection with this project.

Answering paragraph 2f of the defendant's affiant, affiant points out to the court that this was a condemnation suit; that the Federal court ruled that we had an adequate remedy for condemnation in the State courts.

Answering paragraph 3, on June 21, 1955 the City of Tacoma sold bonds totaling 15 million dollars to pay for part of the construction of the Mayfield Dam; that this sale was a matter of public knowledge and of particular knowledge of the defendant's affiant, and in addition thereto, on the 22nd day of June, awarded numerous contracts for equipment in connection with the Mayfield Dam including the general construction contract; that copies of the specifications of the general construction contract were furnished to the Department of Fisheries and Department of Game of the State of Washington; that the defendant's affiant as well as other state officials, were aware of the dates of the call for bids and of the receipt of the same and the contemplated date of award; that these contracts have been awarded with the exception of the contract for generators and the circuit breakers for the Mayfield switch yard; that the commencement of the construction was authorized prior to the issuance of the court order and that the City of Tacoma is equally bound to observe the contract for the construction of the Mayfield Dam, powerhouse and appurtenances.

That the provisions of the Federal Power Commission license issued to the City of Tacoma made adequate provision for the protection of any fish runs in the Cowlitz River; that the defendant's affiant and the officials of the Departments of Game and Fisheries are well aware of these [fol. 122] provisions and have litigated them in the Federal court and the Federal courts in cases which are cited in this matter, have determined that adequate protection has been made for protection of the fish; that the Supreme Court of the State of Washington in 43 Wn (2d) 468 makes particular note that adequate protection has been given the fish runs of the Cowlitz and that any determination in this connection is in the hands of the Federal Power Commission.

/s/ Frank L. Bannon.

Subscribed and sworn to before me this 27th day of June, 1955.

(Seal of Notary)

/s/ Robert R. Hamilton, Notary Public in and for the State of Washington, residing at

[fol. 123] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

ORDER MODIFYING TEMPORARY RESTRAINING ORDER AND ORDER FOR RE-ARGUMENT OF CERTAIN ISSUES—June 30, 1955

This matter having regularly come on for hearing on June 30, 1955 upon plaintiff's motion to quash and to dissolve the temporary restraining order entered herein on June 24, 1955, and plaintiff's request for a ruling on plaintiff's demurrer to the Directors' second amended cross complaint and said defendants' motion to strike from plaintiff's reply herein, plaintiff appearing by E. K. Murray, Frank L. Bannon, and Marshall McCormick, its attorneys; defendants appearing by Richard F. Broz, Joseph T. Mijich, and E. P. Donnelly, Assistant Attorneys General, and the court having considered the files herein and the affidavits filed in support and in opposition of said motion, and this court being advised in the premises,

It Is Ordered that the hearing on the order to show cause why an injunction pendente lite as requested by the said defendants should not be issued be heard, and argument and re-argument of all issues properly raised before this court by motion or demurrer, prior to August 8, 1955 be had, before this court on August 8, 1955 at 10:30 o'clock a.m., and that any additional trial briefs which either party desires to submit shall be served and filed herein not less than five days prior to such hearing, and

[fol. 124] It Is Further Ordered that said temporary restraining order be and the same is hereby modified and amended to read as follows:

> That pending the hearing of the order to show cause herein, plaintiff and its officers and agents be and they are hereby restrained and enjoined from doing any act or thing in any manner interfering with the bed or waters of the Cowlitz River in connection with its Mayfield and Mossyrock Dam Projects, or in any way injurious to the fish runs or fish resources of said river,

And it is further ordered that pursuant to the stipulation of the parties in open court made and as a condition to such modification and amendment it is understood that said defendants do not consent to or acquiesce in such amendment or modification, and that no legal rights of said defendants shall be deemed impaired thereby, nor said defendants deemed estopped to assert any defense herein which they could have asserted had such modifications not been made, and that any expenditure made by plaintiff pending such hearing be at its own hazard and not enhance its equitable position.

Plaintiff excepts to the Court's refusal to quash and to fully dissolve said restraining order, and said defendants except to the action of the court in modifying and amending same.

[fol. 125] Enter this 5 day of July, 1955.

/s/ Charles T. Wright, Judge.

Approved as to form:

Joseph T. Mijich, E. P. Donnelly, Attorneys for Defendants.

Frank L. Bannon, /s/ Marshall McCormick, Attorneys for Plaintiff.

[File endorsement omitted]

[fol. 126] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THURSTON COUNTY

[Title omitted]

MOTION FOR LEAVE TO FILE AMENDED COMPLAINT—Filed July 27, 1955

Comes now the plaintiff and moves the Court for permission to file herein its Amended Complaint, a copy of which is hereunto attached.

Such amendment does not add any new issue or cause of action to the Complaint nor affect any defense heretofore

asserted by the defendants, and is desired in order that certain amendments made within the past year to Ordinance No. 14386 of the City, and to the Federal Power License held by the City, and which Ordinance and License are referred to in the Complaint herein, may be incorporated in the pleadings herein, and said Complaint made to reflect the rulings of the Supreme Court on appeal in this cause.

This motion is based upon the files herein and the affidavit of E. K. Murray herewith filed.

/s/ E. K. Murray, Of Counsel for Plaintiff.

E. K. Murray, Frank L. Bannon, Clarence M. Boyle, Marshall McCormick.

Acknowledgment of service (omitted in printing).

[fol. 127] AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

State of Washington,
County of Pierce, ss.

E. K. Murray, being first duly sworn, on oath deposes and says:

I am one of the attorneys for the plaintiff herein. During the past year and since the service of the defendant's Second Amended Answer and Cross-Complaint herein, Ordinance No. 14386, which is the subject matter of this action, of the plaintiff City, has been amended by two subsequent ordinances of said City, and the Federal Power Commission License referred to in the Complaint has been amended by extending the time within which the City was required to commence construction under said License, and in order that the pleadings herein may correctly show the present provisions of said Ordinance and License as amended, and reflect the ruling made by the Supreme Court on appeal in this cause, it is desired to incorporate proper reference to such amendments in an Amended Complaint herein.

Such proposed amendments will not add any new issue [fol. 128] or cause of action to the Complaint, nor affect any defense heretofore asserted by the defendants, nor result in any delay in the timely disposal of this action.

This affidavit is made in support of plaintiff's motion for leave to file an Amended Complaint herein.

/s/ E. K. Murray, Clarence M. Boyle, Frank L. Bannon and Marshall McCormick.

Subscribed and sworn to before me this 27th day of July, 1955.

/s/ Robert R. Hamilton, Notary Public in and for the State of Washington, residing at Tacoma.

[fol. 129] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

MOTION AND AFFIDAVIT TO SUBSTITUTE DEFENDANTS—Filed July 29, 1955

Come now the above-named defendants, Robert Schoettler, as director of Fisheries, and John A. Biggs, as Director of Game, of the State of Washington, and move the court for its order substituting the State of Washington in their place as defendant in this action.

This motion is based upon the attached affidavit of Joseph T. Mijich, Assistant Attorney General, and on the ground that the State of Washington is the real party in interest.

Don Eastvold, Attorney General, /s/ Joseph T. Mijich, Assistant Attorney General, Attorneys for Defendants.

[fol. 130] AFFIDAVIT ON MOTION TO SUBSTITUTE DEFENDANTS

State of Washington,
County of King, ss.

Joseph T. Mijich, being first duly sworn, on oath, deposes and says:

That he is an Assistant Attorney General of the State of Washington, and one of the attorneys in the above-action, and makes this affidavit in support of the motion for substitution of defendants.

This action was brought by plaintiff under the authority of the state statute relating to declaratory judgments for the purpose of testing and determining plaintiff's right to construct two dams on the Cowlitz River and to issue and sell bonds to pay for such construction. The proposed project will affect lands, structures, waters, and fish, the ownership and jurisdiction over which is in the State of Washington and not in the above-named defendants; and, therefore, the real party in interest, of this action, which will be affected by the decision of this Court is the State of Washington.

This affidavit is made in support of defendants' motion to substitute defendants.

Joseph T. Mijich, Assistant Attorney General.

Subscribed and sworn to before me this 29th day of July, 1955.

Lucy Wolford, Notary Public in and for the State of Washington, residing at Bellevue.

[fol. 132] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

ORDER GRANTING LEAVE TO FILE AMENDED COMPLAINT—August 8, 1955

This matter having regularly come on for hearing on August 1, 1955, upon plaintiff's motion for leave to file an

amended complaint herein, plaintiff appearing by E. K. Murray, Special Counsel, and Frank L. Bannon and Marshall McCormick, Chief Assistant City Attorneys, its attorneys, and defendant Directors above named appearing by Joseph T. Mijich, Richard F. Broz and L. P. Donnelly, Assistant Attorneys General, their attorneys, and the Court having considered said motion and heard the argument of counsel, and being duly advised, it is

Ordered that plaintiff be and is hereby granted leave to forthwith file herein its amended complaint as requested in said motion, with the qualification and upon the condition that the period at the end of paragraph VI thereof be changed to a semicolon and there be added thereto the words "and further to test and determine any other question that may be raised by anyone herein as to the right of plaintiff to construct such project pursuant to said license, and as to the validity of the issue and sale of said bonds for said purposes." Plaintiff excepts to the inclusion of such [fol. 133] qualification and condition in this order, and its exceptions are hereby allowed.

Dated at Olympia, Washington, August 8, 1955.

/s/ Charles T. Wright, Judge.

Presented by:

/s/ E. K. Murray, Of Attorneys for Plaintiff.

Approved as to form:

/s/ E. P. Donnelly, Of Attorneys for State of Washington, Joseph T. Mijich & Atty. for Def. Directors.

[File endorsement omitted]

[fol. 134] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

ORDER PERMITTING THE STATE OF WASHINGTON TO BE ADDED AS A PARTY DEFENDANT—August 8, 1955

This matter having regularly come on for hearing on August 1, 1955, upon motion of the defendant Directors above named that the State of Washington be substituted as a party defendant in their place and stead, plaintiff appearing by E. K. Murray, Special Counsel, and Frank L. Bannon and Marshall McCormick, Chief Assistant City Attorneys, its attorneys, and defendant Directors above named appearing by Joseph T. Mijich, Richard F. Broz and E. P. Donnelly, Assistant Attorneys General, their attorneys, and the Court having considered said motion and heard the arguments of counsel and being duly advised, it is

Ordered that permission is hereby granted to add the State of Washington as a party defendant herein upon the condition that it forthwith appear herein without the necessity of service of amended summons and complaint on it and within 20 days join with said defendant Directors in the filing of an amended answer or cross complaint herein. Plaintiff excepts to this order and the whole thereof, and its exceptions are hereby allowed.

[fol. 135] Dated at Olympia, Washington, August 8, 1955.

/s/ Charles T. Wright, Judge.

Presented by:

/s/ E. K. Murray, Of Attorneys for Plft. (sic).

Approved as to form:

/s/ E. K. Murray, Of Attorneys for Plaintiff.

[File endorsement omitted]

[fol. 136] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

AMENDED COMPLAINT—Filed July 27, 1955

Plaintiff, complaining of defendants, alleges:

I

That at all times herein mentioned plaintiff is and was a city of the first class and a municipal corporation of the State of Washington, located in the County of Pierce therein, and owning, maintaining and operating works, plants and facilities for the generation, transmission and distribution of electricity for lighting, heating, fuel and power purposes pursuant to the provisions of R.C.W. 80.40.010 et seq., and statutes supplemental thereto.

II

That now and at all times herein mentioned, defendant, Robert Schoettler, is and was the duly appointed, qualified and acting Director of Fisheries, and the defendant, John A. Biggs, the duly appointed, qualified and acting Director of Game of the State of Washington.

III

That on January 9, 1952, the City Council of plaintiff passed Ordinance No. 14386 of said City entitled:

> "An ordinance providing for the making of certain additions and betterments to and extensions of the existing electric generating plant and system of the City of Tacoma; specifying and adopting a plan and system proposed therefor; declaring the estimated cost thereof as near as may be; providing for the method of the financing thereof; and providing for the construction thereof."

[fol. 137] which ordinance was duly published on January 10, 1952, and pursuant to the charter of said city became

effective 10 days thereafter, and a duly certified copy of which is attached to the original complaint herein, and is marked Exhibit "A", and by reference is made a part hereof.

Thereafter, the City Council of plaintiff passed ordinances amendatory to said Ordinance No. 14386 as follows:

On August 30, 1954, the City Council passed Ordinance No. 15099 entitled:

> "An ordinance to amend Sections 2, 3, 4, and 5 of Ordinance No. 14386 entitled:
>
> "An ordinance providing for the making of certain additions and betterments to and extensions of the existing electric generating plant and system of the City of Tacoma; specifying and adopting a plan and system proposed therefor; declaring the estimated cost thereof as near as may be; providing for the method of the financing thereof; and providing for the construction thereof."
>
> and repealing Section 6 of Ordinance No. 14386."

which ordinance was duly published on September 2, 1954.

On May 16, 1955, the City Council passed Ordinance No. 15325 entitled:

> "An ordinance to amend Sections 3 and 4 of Ordinance No. 14386 entitled:
>
> "An ordinance providing for the making of certain additions and betterments to and extensions of the existing electric generating plant and system of the City of Tacoma; specifying and adopting a plan and system proposed therefor; declaring the estimated cost thereof as near as may be; providing for the method of the financing thereof; and providing for the construction thereof."

which ordinance was duly published on May 18, 1955.

Which ordinances were duly published as above set forth, and pursuant to the city charter of the plaintiff became

effective 30 days thereafter, and duly certified copies of such ordinances are hereunto attached and marked Exhibits "F" and "G", and made a part hereof.

IV

That in accordance with the plan and system specified and adopted in said Ordinance No. 14386 as amended as [fol. 138] aforesaid, plaintiff proposes to construct the works, plants and facilities therein described, including an impounding dam, with spillway, of a height above tailwater of 325 feet at about Mile 65, and a concrete diversion dam, with spillway, of a height above tailwater of 185 feet at about Mile 52, on the Cowlitz River in Lewis County, Washington; and proposes to use the surplus funds of its electric generating plant and system insofar as the same may be available for that purpose, and to issue and sell its utility revenue bonds in an amount, not exceeding $146,000,000, sufficient to pay the remainder of the costs of said development.

V

That plaintiff on August 6, 1948, filed with the Federal Power Commission pursuant to the provisions of the Federal Power Act (16 U.S.C.A. Sec. 791 et seq.) its Declaration of Intention to construct said project (Project No. 2016 of said Commission) as described in said Ordinance No. 14386, and thereafter on December 28, 1948, followed this with its application to said Commission for a license under said Act so to do.

That thereafter on March 8, 1949, said Commission made and entered its Findings and Order that said Cowlitz River is a navigable water of the United States and that the construction and operation of said project would affect public lands and the navigable capacity of said river and the interests of interstate and foreign commerce, and holding that said project came within its jurisdiction under said Act, a full, true and correct copy of which Findings and Order is attached to the original complaint herein and is marked Exhibit "B", and by reference is made a part hereof. That no repeal or review was ever taken or sought of said order.

That thereafter a hearing was duly held on said application for said license before said Commission, and on Novem-
[fol. 139] ber 28, 1951, said Commission rendered its opinion directing issuance of said license to plaintiff, and fixing the terms and provisions thereof. That full, true and correct copies of said opinion, said license, including plaintiff's acceptance thereof, and of the order of said Commission issued January 24, 1952, denying any rehearing thereon, are attached to the original complaint herein and are marked Exhibits "C", "D" and "E", respectively, and by reference are made a part hereof.

That thereafter such opinion, license and order, upon petition of the Department of Fisheries and the Department of Game of the State of Washington, were reviewed before the U.S. Court of Appeals (207 Fed (2d) 391 Certiorari denied 98 L.Ed 513) pursuant to the provisions of 16 U.S.C.A. Sec. 823, and affirmed thereby.

That thereafter upon application of plaintiff, said license was duly amended by order of said Federal Power Commission, adopted February 24, 1954, to extend the time for commencement of work on said project. That a full, true and correct copy of such order is hereunto attached marked Exhibit "H" and made a part hereof. That said license as so amended is now in full force and effect.

VI

That this action is brought by plaintiff under authority of R.C.W. 7.24.010 et seq., relating to declaratory judgments, and R.C.W. 7.24.150 et seq., providing for the testing and determining of the validity of the issuance and sale of bonds, for the purpose of testing and determining plaintiff's right to issue and sell bonds as provided and proposed in said Ordinance No. 14386 as amended as aforesaid, for the purposes therein provided, including the constructions of said dams on said Cowlitz River, within the migration range of anadromous fish as determined by the Director of Fisheries and the Director of Game of the
[fol. 140] State of Washington, and particularly for the purpose of determining whether or not Chapter 9, Laws of 1949, purporting to create a sanctuary for the protection

of anadromous fish life on said Cowlitz and other rivers, and to make it the duty of the Director of Fisheries and the Director of Game of the State of Washington to acquire and abate any dam or other obstruction on said rivers or to acquire any water rights which may become vested therein, or Sections 46 and 49, Chapter 112, Laws of 1949, or any other law of the State of Washington, is a bar to such constructions and to the issuance and sale of bonds by plaintiff for such purposes; and further to test and determine any other question that may be raised by anyone herein as to the right of plaintiff to construct such project pursuant to said license, and as to the validity of the issuance and sale of said bonds for said purposes.

VII

That the provisions of said Chapter 9, Laws of 1949, (R.C.W. 75.20.010 et seq.) relating to the use of the waters of said Cowlitz and other rivers, and to the construction and maintenance of dams thereon, and the provisions of Sections 46 and 49, Chapter 112, Laws of 1949, as amended (R.C.W. 75.20.010 and 75.20.100) are contrary to and in direct conflict with the provisions of the Federal Power Act relating to and providing for the use of such waters, and said acts are unconstitutional or inapplicable under the provisions of Article VI of the Constitution of the United States and Article I, Section 2, of the Constitution of the State of Washington.

That said Chapter 9, Laws of 1949, is further unconstitutional under the provisions of Article II, Section 19, of the Constitution of the State of Washington, in that the subject thereof is not expressed in the title of said act, and it embraces more than one subject; and is further unconstitutional under the provisions of Article II, Section 1, of said State Constitution in that it contains an unlawful delegation of legislative authority.

VIII

That pursuant to the provisions of said Rem. Rev. Stat. of Washington, Sections 5616-11 et seq., the Court is di-
[fols. 141, 142] rected, upon the filing of the complaint here-

in, to name a representative taxpayer or taxpayers of plaintiff City upon whom service of process in this action shall be made as the representative of all taxpayers of said City, except such as may intervene as provided in said statute; and in case such taxpayer or taxpayers so named shall default, to appoint an attorney to defend this action on behalf of all the taxpayers of said City; and to allow the taxpayer or taxpayers or such attorney so appointed a reasonable attorney's fee and costs to be paid by the plaintiff herein.

That such taxpayers and such attorney were heretofore appointed herein and participated fully herein, and by order of this court were heretofore excused from further participation herein, and the cause determined as to them upon the grounds that all questions for decision and all issues proper for determination herein affecting them have been decided by the Supreme Court upon appeal to that court heretofore taken herein.

Wherefrom, plaintiff prays:

1. For action in the naming of representative taxpayers and selection or appointment of an attorney therefor, and the excusing of said parties and attorney from further participation herein and determination of this cause as to them, as heretofore taken and done by the court herein.

2. That the Court test, declare and determine the validity of said bonds and plaintiff's right to issue and sell the same as provided and proposed in said Ordinance No. 14386 as amended as aforesaid, for the purposes therein provided, including the construction of said dams on said river; and particularly that the Court determine whether or not said Chapter 9, Laws of 1949, and said Sections 46 and 49, Chapter 112, Laws of 1949, or any other law, are valid and applicable and a bar to construction of said dams on said river by plaintiff pursuant to the provisions [fol. 143] of said license granted plaintiff by said Federal Power Commission; and further that the Court test, declare and determine any other question that may be raised by anyone herein as to the right of plaintiff to construct said project pursuant to said license and as to the validity of

the issuance and sale of said bonds for the purposes aforesaid.

3. That plaintiff have such other and further relief, and the Court make such other and further findings, declarations and determinations as it deems necessary and meet to establish the validity of said bonds and the issuance and sale thereof.

/s/ E. K. Murray, Special Counsel, /s/ Clarence M. Boyle, City Attorney, /s/ Marshall McCormick, Chief Asst. City Attorney, /s/ Frank L. Bannon, Chief Asst. City Attorney, Attorneys for Plaintiff.

[fol. 144] *Duly sworn to by H. M. Tollefson, jurat omitted in printing.*

[File endorsement omitted]

[fol. 145] CITY OF TACOMA, WASHINGTON
OFFICE OF CITY CLERK

July 26, 1955

CITY CLERK'S CERTIFICATE

I, Josephine Melton, City Clerk of the City of Tacoma, Pierce County, Washington, hereby certify that the attached is a full, true and correct copy of Ordinance No. 14386, passed by the Council on January 9, 1952, Ordinance No. 15099, passed by the Council on August 30, 1954 and Ordinance No. 15325, passed by the Council on May 16, 1955.

Witness my hand and the seal of said City this 26th day of July, 1955.

/s/ Josephine Melton, City Clerk.

(Seal of the City of Tacoma)

[fol. 145A] EXHIBIT "F" TO AMENDED COMPLAINT

ORDINANCE NO. 15099

BY HUMISTON
(By request)

AN ORDINANCE to amend Sections 2, 3, 4, and 5 of Ordinance No. 14386 entitled:

> "An ordinance providing for the making of certain additions and betterments to and extensions of the existing electric generating plant and system of the City of Tacoma; specifying and adopting a plan and system proposed therefor; declaring the estimated cost thereof as near as may be; providing for the method of the financing thereof; and providing for the construction thereof."

and repealing Section 6 of Ordinance No. 14386.

BE IT ORDAINED BY THE CITY OF TACOMA:

Section 1. That Section 2 of Ordinance No. 14386 be and the same is hereby amended to read as follows:

Section 2. That the City of Tacoma hereby specifies and adopts the plan and system hereinafter set forth for the making of said additions and betterments to and extensions of said existing plant and system, to-wit:

(a) Construction of an impounding dam, with spillway, about 545 feet in height above bedrock and 325 feet above tailwater in the Southwest quarter of Section 10, Township 12 North, Range 3 East, W.M., at about a mile 65 on the Cowlitz River approximately two and one-half miles east of the town of Mossyrock, Lewis County, Washington, and being about 1300 feet in length at its crest; a powerhouse housing three vertical turbine-generator units of 75,000 kilowatts capacity each, with provision for a fourth unit of 75,000 kilowatts capacity to be installed upon authorization by the Public Utility Board of the City of Tacoma and the Federal Power Commission; the necessary pressure pipes extended through said dam to said powerhouse;

step-up transformer and switching station; and all machinery, appurtenances, appliances and facilities necessary for a hydroelectric plant, said dam to be known as the Mossyrock Dam.

(b) Construction of a concrete diversion dam, with spillway, about 250 feet in height above bedrock and 185 feet in height above tailwater in the Southwest quarter of Section 20 and the Northwest quarter of Section 29, Township 12 North, Range 2 East, W.M., at about a mile 52 on the Cowlitz River and about a mile southwest of the town of Mayfield, Lewis County, Washington, and about 850 feet in length at its crest; a tunnel about 880 feet long on the north bank of the Cowlitz River with associated concrete [fol. 145B] headworks, fish screens, forebay, gate house and steel penstocks necessary to conduct the water from said dam to the powerhouse, a concrete powerhouse located on the north bank of the Cowlitz River below said dam housing three vertical turbine-generator units of 40,000 kilowatts capacity each, with provision for a fourth unit of 40,000 kilowatts capacity to be installed upon the authorization of the Public Utility Board of the City of Tacoma and by the Federal Power Commission; step-up transformer and switching station and all machinery, appurtenances, appliances and facilities necessary for a hydroelectric plant, said dam to be known as the Mayfield Dam.

(c) Construction of 230 kilovolt transmission lines on steel towers from each of the two aforesaid powerhouses to a junction between the two dams and thence in a northerly direction by the most feasible route to the Cowlitz substation on the outskirts of the City of Tacoma, said transmission lines to have an aggregate length of about 60 miles.

(d) Construction of step down transformer and switching equipment in said Cowlitz substation necessary for the incoming power.

(e) Construction of such fish hatcheries, fish ladders, fish traps, or other fish handling facilities or fish protective devices as shall be approved and required by the Federal Power Commission and the State of Washington.

(f) Construction of residences for employes and other necessary buildings at said dams and powerhouse sites together with utilities therefor; necessary roadway and communication systems; temporary spur railroad tracks; removal of timber and debris from areas to be inundated; and construction of such other improvements as may be required to complete said project.

(g) Acquisition by purchase, condemnation, or otherwise of 16,000 acres of land, more or less, for dam sites, powerhouse sites, reservoirs and storage basin sites, operator's villages, tunnels, construction offices; fishways, fish hatcheries and other fish facilities, borrow pits, roads, bridges and necessary right of ways, said lands being located in

> Sections 1, 2, 3, 9, 10, 11, 16, 19, 20, 21, 27, 28, 29 and 30 of Township 12 North, Range 2 East of Willamette Meridian; Sections 25, 26, 34 and 35 of Township 13 North, Range 2 East, W.M.; Sections 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23 and 24 of Township 12 North, Range 3 East, W.M.; Sections 7, 18, 19, 20, 27, 28, 29, 30, 32, 33, 34, 35 and 36 of Township 12 North, Range 4 [fol. 145C] East, W.M.; Sections 1, 2, 3, 4, 11 and 12 of Township 11 North, Range 4 East, W.M.; Sections 28, 29, 30, 31, 32, 33 and 34 of Township 12 North, Range 5 East, W.M.; and Sections 2, 3, 4, 5, and 6 of Township 11 North, Range 5 East, W.M.; all of said lands being located in Lewis County of the State of Washington,

also acquisition of right of ways for relocation of those portions of state, county and private roads and highways, and telephone and power lines inundated by storage water impounded behind said dam; acquisition of right of ways for such spur railroad tracks or access roads as may be required to be extended from the closest feasible point on available railroads or public highways to a point at or near said dam sites; acquisition of such fish hatchery sites and water rights as may be required by the Federal Power Commission; acquisition of right of ways for the above described transmission lines from said power houses to the existing Cowlitz substation near Tacoma; and acquisition of all water rights, franchises, easements, right of

ways and privileges which may be required in connection with any improvement authorized by this ordinance.

The construction of this project has been licensed by the Federal Power Commission under Project No. 2016, and the construction herein authorized shall conform with the requirements of such license.

Section 2. That Section 3 of Ordinance No. 14386 as amended, be and the same is hereby amended to read as follows:

Section 3. That the entire improvement consisting of the additions and betterments to and extensions of the said existing electric generating plant and system shall be known and designated as Cowlitz Power Development. That the total estimated cost of said Development declared as near as may be is the sum of $146,000,000.00.

That the gross revenues of the electric generating plant and system of the City of Tacoma, now owned by it, or which may be hereafter acquired at the current rates charged and to be charged for electric energy generated thereby, will be sufficient to meet all expenses of operation and maintenance including the operation and maintenance of the proposed additions, betterments and extensions thereto and all charges heretofore created against said revenues, including the charges thereon heretofore created by Ordinance No. 12037, passed July 21, 1941, Ordinance No. 12140, passed December 17, 1941 as amended by Ordinance No. 12176, passed February 4, 1942, Ordinance No. 12398, passed May 19, 1943, Ordinance No. 12452, passed September 1, 1943, Ordinance No. 12523, passed March 15, 1944, Ordinance No. 12561, passed August 9, 1944, Ordinance No. 13846, passed April 26, 1950, Ordinance No. 13992, passed October 11, 1950, Ordinance No. 14949, passed December 21, 1953, and Ordinance No. 15087, passed August 16, 1954, and to permit the setting aside of a fixed amount [fol. 145D] of said revenues without regard to any fixed proportion thereof sufficient to pay the interest on the bonds to be issued as herein provided and to pay and redeem the principal at maturity.

Section 3. That Section 4 of Ordinance No. 14386 as amended, be and the same is hereby amended to read as follows:

Section 4. That in order to carry out the plan and system specified and adopted herein for the construction of said Development, the City of Tacoma shall use the surplus funds of the electric generating plant and system insofar as the same may be available for that purpose, and shall issue and sell, pursuant to law, its utility revenue bonds in an amount sufficient to pay the remainder of the costs of the said Development.

Said bonds shall be issued in ten series, to be designated as Series A, Series B, Series C, Series D, Series E, Series F, Series G, Series H, Series J and Series K. That Series A, Series B, Series C, Series D, Series E, Series F, Series G, Series H, Series J, issues shall each be in the amount of $15,000,000.00 and the Series K issue in the amount required to complete such Development, but in no event to be in excess of $11,000,000.00. As between the various series of bonds to be so issued there shall be no priority with respect to payment of principal or interest out of the revenues of said plant and system. No bonds or other evidences of indebtedness payable out of the revenues of said plant and system shall be issued by the City of Tacoma, nor any charge of any kind so created, having any priority over the bonds herein authorized to be issued with respect to payment of principal or interest out of the revenues of said plant and system, except as set forth in Section 3.

That each of said series of bonds shall bear the date of their issue, shall bear interest not exceeding six per cent per annum, shall be numbered from one up consecutively, and shall contain such terms and conditions, be in the form and in the denominations, executed in the manner and payable at the times and places as the Council shall be ordinance passed subsequent hereto in the case of each of said series, authorize and determine, and shall be sold in such manner as the Council shall deem for the best interests of the City; and shall be payable only out of such special fund as the Council shall by ordinance hereafter create.

Section 4. That Section 5 of Ordinance No. 14386 be and the same is hereby amended to read as follows:

Section 5. That the *Department of Public Utilities, Light Division,* be and is hereby authorized to proceed with the construction of said improvements and in connection there-

with, to use the surplus funds of the electric generating [fol. 145E] plant and system insofar as the same may be available for that purpose. That the *Department of Public Utilities, Light Division, be and is hereby authorized to advance without interest current funds of said electric generating plant and system for said construction purpose pending the sale of the bonds herein authorized, and from the proceeds of the sale of said bonds, the current funds of the electric generating plant and system shall be repaid such advance.*

That the Council shall by ordinance direct the issuance and sale of bonds hereinabove authorized in such manner and at such time as it shall direct and in accordance with law.

Section 5. That Section 6 of Ordinance No. 14386 as amended, be and is hereby repealed.

Passed Aug. 30, 1954

H. M. TOLLEFSON
Mayor

Attest:

JOSEPHINE MELTON
City Clerk

Requested by Public Utility Board
by Resolution No. U-157

[fol. 145F] EXHIBIT "G" TO AMENDED COMPLAINT

ORDINANCE NO. 15325

BY HUMISTON
(By request)

AN ORDINANCE to amend Sections 3 and 4 of Ordinance No. 14386 entitled:

"An ordinance providing for the making of certain additions and betterments to and extensions of the existing electric generating plant and system of the City of Tacoma; specifying and adopting a plan and system proposed therefor; declaring the estimated cost

thereof as near as may be; providing for the method of the financing thereof; and providing for the construction thereof."

BE IT ORDAINED BY THE CITY OF TACOMA:

Section 1. That Section 3 of Ordinance No. 14386 as amended, be and the same is hereby amended to read as follows:

Section 3. That the entire improvement consisting of the additions and betterments to and extensions of the said existing electric generating plant and system shall be known and designated as Cowlitz Power Development. That the total estimated cost of said Development declared as near as may be is the sum of $146,000,000.00.

That the gross revenues of the electric generating plant and system *and the electric power and light transmission and distribution system* of the City of Tacoma, now owned by it, or which may be hereafter acquired at the current rates charged and to be charged for electric energy generated thereby, will be sufficient to meet all expenses of operation and maintenance including the operation and maintenance of the proposed additions, betterments and extensions including the charges thereon heretofore created by Ordinance No. 12037, passed July 21, 1941, Ordinance No. 12140, passed December 17, 1941 as amended by Ordinance No. 12176, passed February 4, 1942, Ordinance No. 12398, passed May 19, 1943, Ordinance No. 12452, passed September 1, 1943, Ordinance No. 12523, passed March 15, 1944, Ordinance No. 12561, passed August 9, 1944, Ordinance No. 13846, passed April 26, 1950, Ordinance No. 13992, passed October 11, 1950 and Ordinance No. 14949, passed December 21, 1953, and to permit the setting aside of a fixed amount of said revenues without regard to any fixed proprtion thereof sufficient to pay the interest on the bonds to be issued as herein provided and to pay and redeem the principal at maturity.

[fol. 145G] Section 2. That Section 4 of Ordinance No. 14386 as amended, be and the same is hereby amended to read as follows:

Section 4. That in order to carry out the plan and system specified and adopted herein for the construction of said

Development, the City of Tacoma shall use the surplus funds of the electric generating plant and system *and the electric power and light transmission and distribution system* insofar as the same may be available for that purpose, and shall issue and sell, pursuant to law, its utility revenue bonds in an amount sufficient to pay the remainder of the costs of the said Development.

Said bonds shall be issued in ten series, to be designated as Series A, Series B, Series C, Series D, Series E, Series F, Series G, Series H, Series J and Series K. That Series A, Series B, Series C, Series D, Series E, Series F, Series G, Series H, Series J, issues shall each be in the amount of $15,000,000.00 and the Series K issue in the amount required to complete such Development, but in no event to be in excess of $11,000,000.00. As between the various series of bonds to be so issued there shall be no priority with respect to payment of principal or interest out of the revenues of said plant and system. No bonds or other evidences of indebtedness payable out of the revenues of said plant and system shall be issued by the City of Tacoma, nor any charge of any kind so created, having any priority over the bonds herein authorized to be issued with respect to payment of principal or interest out of the revenues of said plant and system, except as set forth in Section 3.

That each of said series of bonds shall bear the date of their issue, shall bear interest not exceeding six percent per annum, shall be numbered from one up consecutively, and shall contain such terms and conditions, be in the form and in the denominations, executed in the manner and payable at the times and places as the Council shall by ordinance passed subsequent hereto in the case of each of said series, authorize and determine, and shall be sold in such manner as the Council shall deem for the best interests of the City; and shall be payable only out of such special fund as the Council shall by ordinance hereafter create.

Passed May 16, 1955

H. M. TOLLEFSON
Mayor

Attest:

JOSEPHINE MELTON
City Clerk

Requested by Public Utility Board
by Resolution No. U-332

[fol. 145H] CERTIFICATE

I, C. A. GAISFORD, hereby certify that I am the Director of Finance of the City of Tacoma and responsible for the original records of all licenses, deeds, etc., and that the attached copy of the order of the Federal Power Commission in the matter of Project 2016 which was adopted February 24, 1954, is a true and correct copy of the order on file with me which was issued by the Federal Power Commission.

Dated this 26th day of July, 1955.

/s/ C. A. GAISFORD
C. A. Gaisford

[fol. 145I] EXHIBIT "H" TO AMENDED COMPLAINT

FP-1252

INSTRUMENT No. 2

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Dale E. Doty and Seaborn L. Digby.

In the Matter of	)	
	)	Project No. 2016
City of Tacoma, Washington	)	

ORDER EXTENDING TIME FOR COMMENCING CONSTRUCTION OF PROJECT AND FILING PROJECT EXHIBITS

On November 23, 1953, City of Tacoma, Washington, licensee for major Project No. 2016 filed a request for extension of the time specified respectively in Articles 28 and 33 of the license for commencing construction of the project and for submitting Exhibits F and K.

Under Articles 28 and 33 of the license, the licensee is required to commence construction of the project and file Exhibits F and K within two years of the effective date (January 1, 1952) of the license. The request for extension would postpone the starting and filing dates to December 31, 1955, four years from the effective date of the license.

Delay in the commencement of construction has been caused by the appeal to the United States Court of Appeals for the Ninth Circuit, taken by the Department of Game of the State of Washington, the Department of Fisheries of the State of Washington and the Washington State Sportsmen's Council, Inc., interveners, from the Commission's November 28, 1951 order granting the license. The Court of Appeals rendered its decision on the case, 207 F.2d 391, on October 5, 1953. Licensee is informed that Appellants intend to seek final review by the United States Supreme Court. Moreover, the licensee's plans for financing Project No. 2016 called for the sale of revenue bonds of its electric utility. Because of the appeal to the Ninth Circuit Court and until the statutory time for appeal to the Supreme Court has passed, the bonds are not salable.

The Commission *finds*:

The requested extension of time is not incompatible with the public interest.

The Commission *orders*:

The time for commencement of construction of Project No. 2016 and for filing Exhibits F and K is hereby extended to December 31, 1955, four years from the effective date of the license.

By the Commission. Chairman Kuykendall not participating.

/s/ LEON M. FUQUAY
Leon M. Fuquay,
Secretary.

Adopted: February 24, 1954

Issued: February 26, 1954

[fol. 145J] November 16, 1953

Mr. Leon M. Fuquay, Secretary
Federal Power Commission
441 G Street, N. W.
Washington, D. C.

Re: Project No. 2016

Dear Mr. Fuquay:

Enclosed are eight copies of an application for extension of time submitted pursuant to Section 5.3 of the General Rules and Regulations of the Federal Power Commission. This application is submitted for the purpose of requesting an additional period of two years in which to commence construction of the project and to file Exhibits F and K. This application is necessary for the reason that the City has not been able to commence construction due to the appeal taken under Case No. 13289 in the United States Court of Appeals for the Ninth Circuit by the Department of Game of the State of Washington, The Department of Fisheries of the State of Washington and the Washington State Sportsmen's Council, Inc. vs. Federal Power Commission. As you are aware the estimated cost of this project is the sum of $146,000,000 and as shown by the evidence before the Commission it was anticipated that the City would finance this development through revenue bonds of its electric utility. As you can readily appreciate, such bonds were not salable as long as litigation was pending and will not be salable until the statutory time for appeal from the decision of the Ninth Circuit Court has passed.

Effective June 1, 1953 a new Charter became effective for the City of Tacoma, which Charter by Sections 4.8 to 4.24 inclusive provides for the appointment of a Public Utility Board, which Board has "full power to construct, condemn and purchase, purchase, acquire, add to, maintain, and operate the electric . . . utility system." In accordance with the provisions of the quoted sections the attached application has been executed by the Chairman [fol. 145K] and Secretary of the Board and the Director of Utilities, who is the Chief executive officer of the Department. We trust you will find the same in order.

In view of the facts set forth above and in the application for extension of time it is respectfully requested that the Commission favorably consider this application and grant the extension as requested.

Yours very truly,

Dean Barline,
Assistant City Attorney

JDB:ed

[fol. 145L] BEFORE THE FEDERAL POWER COMMISSION

APPLICATION FOR AMENDMENT OF LICENSE

1. The City of Tacoma, a municipal corporation organized under the laws of the State of Washington, licensee for a power project, designated as Project No. 2016 in the records of the Federal Power Commission, issued on the 28th day of November, 1951, hereby makes application to said Commission for an amendment of the license for said project in the manner and to the extent described herein.

2. (Statement or description of change desired):

Amendment of Article 28 to read as follows: The licensee shall commence construction of the project within *four (4)* years of the effective date of this license; and shall thereafter in good faith and with due diligence prosecute such construction; and shall complete the project works in thirty-six (36) months *after commencement of construction.*

Also, to amend Article 33 to read as follows: The licensee shall, within *four (4)* years of the effective date of this license, file Exhibits F and K in accordance with the rules and regulations of the Commission.

3. The proposed changes are necessary and desirable for the following reasons: Immediately following issuance of the license by the Federal Power Commission the Department of Game of the State of Washington, The Department of Fisheries of the State of Washington and the

Washington State Sportsmen's Council, Inc., interveners, appealed the action of the Federal Power Commission in granting said license, said appeal being Case No. 13289 in the United States Court of Appeals for the Ninth Circuit, upon which a decision was rendered October 5, 1953 and from which decision we are informed the appellants intend to request review by the United States Supreme Court. In view of this action against the Federal Power Commission the City has been unable to obtain financing by the sale of utility bonds for construction purposes, inasmuch as financial houses were reticent to advance monies as long as this litigation was pending and until the same was determined. It is accordingly requested that the time for commencement of construction and the filing of Exhibits F and K be advanced for an additional period of two (2) years.

[fol. 145M] In witness whereof the applicant has caused its name to be hereunto signed by Garrit VanderEnde, Thomas W. Anderson and G. A. Erdahl, Chairman and Secretary of the Public Utility Board and Director of Public Utilities, respectively, and its corporate seal to be hereto affixed by Josephine Melton its City Clerk, thereunto duly authorized, this 17th day of November, 1953.

City of Tacoma

By /s/ GARRIT VANDERENDE
Chairman, Public Utility Board

Attest:

/s/ THOMAS W. ANDERSON
Secretary, Public Utility Board

/s/ JOSEPHINE MELTON
City Clerk

Approved:

/s/ G. A. ERDAHL
Director of Utilities

VERIFICATION

State of Washington,
County of Pierce, ss.

Garrit VanderEnde, Thomas W. Anderson and C. A. Erdahl being first duly sworn depose and say: That they are the Chairman and Secretary of the Public Utility Board and Director of Public Utilities City of Tacoma, the applicant for an amendment to the license for Project No. 2016, that they have read the foregoing application and know the contents thereof; that the same are true to the best of their knowledge and belief.

/s/ GARRIT VANDERENDE
/s/ THOMAS W. ANDERSON
/s/ C. A. ERDAHL

Subscribed and sworn to before me this 17th day of November, 1953.

/s/ DEAN BARLINE
Notary Public

[fol. 145N] FEDERAL POWER COMMISSION
REGIONAL OFFICE
100 MC ALLISTER STREET
SAN FRANCISCO 2, CALIF.

100-2
WA#6
2016—Wash. October 10, 195

Mr. J. Frank Ward, Superintendent
Light Division
Department of Public Utilities
City of Tacoma
Tacoma 2, Washington

Dear Mr. Ward:

Receipt is acknowledged of your letter dated October 6 1952 transmitting an application (5 copies for amendmen

of license for Cowlitz River Project No. 2016—Wash., changing the number of initial units to be installed from three to four at both the Mayfield and Mossyrock plants.

The application has been examined and appears to be in good order. It has been forwarded to Washington, for consideration by the Federal Power Commission. The official filing date is the date on which the application is received by the Secretary's office in Washington.

Very truly yours,

/s/ LESHER S. WING
Lesher S. Wing
Regional Director

[fol. 1450] October 6, 1952.

Federal Power Commission
106 McAllister Street
San Francisco 2, California

Attention: Mr. Lesher S. Wing,
Regional Engineer

Subject: Application for Amendment to License—
Project #2016—Wash.
City of Tacoma

Gentlemen:

Herewith are five copies of a proposed amendment to our license for the Cowlitz Power Development, changing the number of initial units to be installed from three to four at both the Mayfield and Mossyrock plants as explained in our letter to you of March 17, 1952. The request is made in compliance with your letter of March 24, 1952, since the official advertisement lists only three units for each plant.

Yours very truly,

J. Frank Ward
Superintendent
Light Division

JFW:dd
Enc.

[fol. 145P] BEFORE THE
FEDERAL POWER COMMISSION

APPLICATION FOR AMENDMENT OF LICENSE

1. City of Tacoma a municipality organized under the laws of the State of Washington, licensee for a power project, designated as Project No. 2016 in the records of the Federal Power Commission, issued on the 28th day of November, 1951, hereby makes application to said Commission for an amendment of the license for said project in the manner and to the extent described herein.

2. Statement or description of change desired:

It is requested that the Commission grant permission for the installation of the fourth and ultimate generating units at both the Mayfield and Mossyrock power houses. This will increase the installed capacity from 120,000 kw to 160,000 kw at Mayfield and from 225,000 kw to 300,000 kw at Mossyrock, or to the ultimate capacity of 460,000 kw as stated in the license application.

3. The proposed changes are necessary and desirable for the following reasons:

Due to litigation, the starting of construction under the license has been delayed far beyond the scheduled time. The power deficiency still exists and the increased installed capacity can be utilized as quickly as it can be installed. Unless costs rise precipitously before contracts can be awarded it is believed that a considerable saving can be made by installing all units under one construction schedule.

4. The following exhibits filed with the Commission will require changes due to the adding of the fourth unit and will be resubmitted as soon as prepared:

[fol. 145Q] (a) Exhibit L, Sheet 1—(FPC-2016-2)
Mayfield Dam—General Plan
Modification necessary.

(b) Exhibit L, Sheet 5—(FPC-2016-7)
Mayfield Power House—Plan & Sections to be superseded.

(c) Exhibit L, Sheet 6—(FPC-2016-8)
Mayfield Power House and Intake to be superseded.

(d) Exhibit L, Sheet 8—(FPC-2016-10)
Mayfield Switchyard—General Plan to be superseded.

(e) Exhibit L, Sheet 7—(FPC-2016-9)
Mayfield—One Line Diagram to be superseded.

(f) Exhibit L, Sheet 9—(FPC-2016-17)
Mossyrock Dam—Plan & Sections to be superseded.

(g) Exhibit L, Sheet 11—(FPC-2016-13)
Mossyrock Power House—Plan & Sections to be superseded.

(h) Exhibit L, Sheet 13—(FPC-2016-15)
Mossyrock—One Line Diagram to be superseded.

(i) Exhibit L, Sheet 14—(FPC-2016-16)
Mossyrock Switchyard—General Plan to be superseded.

In witness whereof the applicant has caused its name to be hereunto signed by John H. Anderson its Mayor, and C. A. Erdahl its Commissioner of Public Utilities, and its corporate seal to be hereto affixed by Josephine Melton its City Clerk, thereunto duly authorized, this 1st day of Oct., 1952.

Form Approved: .....
Clarence M. Boyle
Corporation Counsel

.....

By .....
John H. Anderson
Mayor

And By .....
C. A. Erdahl
Commissioner of Public Utilities.

Verification

State of Washington,
County of Pierce, ss.

John H. Anderson and C. A. Erdahl, being first duly sworn, depose and say:

That they are the Mayor and Commissioner of Public Utilities respectively of the City of Tacoma, the applicant for an amendment to the license for Project No. 2016; that they have read the foregoing application and know the contents thereof; that the same are true to the best of their knowledge and belief.

John H. Anderson, C. A. Erdahl.

Subscribed and sworn to before me this 1st day of Oct., 1952.

C. M. Boyle, Notary Public in and for the State of Washington, residing at Tacoma.

[fol. 151] In the Superior Court of the State of Washington, for Thurston County

---

City of Tacoma, a municipal corporation, Plaintiff,

v.

Taxpayers of Tacoma, Washington, and Robert Schoettler, as Director of Fisheries, and John A. Biggs, as Director of Game, of the State of Washington, and The State of Washington, a sovereign state, Defendants.

Defendants' Answer and Cross-Complaint to Plaintiff's Amended Complaint—Filed August 29, 1955

Come now the defendants, The State of Washington, a sovereign state, and Robert Schoettler, as State Director of Fisheries, and John A. Biggs, as State Director of Game, and by way of answer and cross-complaint to and against

the amended complaint of the plaintiff, admit, deny, and allege as follows:

I.

The allegations contained in paragraph I of plaintiff's amended complaint are hereby admitted.

II.

The allegations contained in paragraph II of plaintiff's amended complaint are hereby admitted.

III.

Answering paragraph III of plaintiff's amended complaint, these answering defendants admit that plaintiff did all of the things therein set forth, but allege that said Ordinance No. 14386, as amended, attempts to authorize and require unlawful acts as set forth in defendants' affirmative defenses.

[fol. 152] IV.

The allegations contained in paragraph IV of plaintiff's amended complaint are hereby denied for the reason that plaintiff is not proceeding in accordance with the terms of its federal license, as is required by its ordinance.

V.

Answering paragraph V of plaintiff's amended complaint, these answering defendants admit:

That plaintiff, on August 6, 1948, filed with the Federal Power Commission its declaration of intention to construct the project described in its Ordinance No. 14386, and thereafter on December 28, 1948, applied to said Commission for a license; that on March 8, 1949, the Federal Power Commission made and entered the findings and order which are attached to plaintiff's original complaint and marked Exhibit "B"; that the Federal Power Commission rendered the opinion, issued the license, and issued the order denying rehearing, which are attached to plaintiff's

original complaint and marked Exhibits "C", "D", and "E"; that the United States Court of Appeals reviewed the findings of the Federal Power Commission in 207 F. (2d) 391; that on February 24, 1954, the Federal Power Commission issued the order attached to plaintiff's amended Complaint and marked Exhibit "H"; however, these answering defendants deny each and every other allegation contained in said paragraph.

VI.

The allegations contained in paragraph VI of plaintiff's amended complaint are hereby admitted.

[fol. 153]

VII.

The allegations contained in paragraph VII of plaintiff's amended complaint are hereby denied.

VIII.

Answering paragraph VIII of plaintiff's amended complaint, these answering defendants admit that the Taxpayers and an attorney were heretofore appointed and participated herein, but allege that they were absolved from further participation upon motion of the plaintiff; but deny each and every other allegation contained therein.

AFFIRMATIVE DEFENSES

I.

As a first affirmative defense to plaintiff's amended complaint, defendants allege as follows:

That the proposed project will interfere with public navigation on the Cowlitz River, which the City is prohibited from doing under the provisions of R.C.W. 80.40.010.

II.

As a second affirmative defense to plaintiff's amended complaint, defendants allege as follows:

That the proposed project will damage and destroy state lands dedicated to a public use which the plaintiff is unable to acquire.

CROSS-COMPLAINT

As a further affirmative defense and by way of cross-complaint to plaintiff's amended complaint, defendants complain and allege as follows:

[fol. 154]

I.

That the State of Washington is a sovereign state of the United States and the City of Tacoma is a political subdivision thereof; that Robert Schoettler and John A. Biggs are the directors of the Departments of Fisheries and Game of the State of Washington respectively.

II.

That notwithstanding the pendency of this action, and prior to any determination of their right so to do, the City of Tacoma entered into a construction contract on June 23, 1955, to build the first of two dams on the Cowlitz River, and is presently proceeding, and unless restrained by this Court, will continue to proceed with its construction until completion.

III.

That the Cowlitz River is used and is capable of use for public navigation; that the construction and operation of the project, as contemplated by Tacoma, will necessarily interfere with such public navigation; that such interference is specifically prohibited under the provisions of R.C.W. 80.40.010.

IV.

That the project proposed in Tacoma's Ordinance No. 14386, as amended, will inundate and make completely useless a state fish hatchery, devoted to a public use, which the City is unable to acquire; that the State Game Commission has passed a resolution, resisting its acquisition

by the City, a copy of which is attached hereto and marke Exhibit "I" and incorporated by reference herein.

[fol. 155] VI.

That the construction commenced by the City of Tacom will result in the inundation of several miles of Primar State Highway No. 5, which is state land presently devote to a public use; that Tacoma has not filed an applicatio with nor received approval from either the State Supe visor of Water Resources or the Director of Highway as required by R.C.W. 90.28.010, to inundate said highwa that the City has attempted to circumvent this statute b attempting to condemn part of said highway in feder court, which action was dismissed by said court for th reason that "The federal government does not have a thority to remove limitations on the powers of Washin ton cities expressly provided by the legislature of th sovereign state", a copy of which opinion is attached here and marked Exhibit "J" and incorporated by referen herein.

VII.

That the City of Tacoma has commenced construction the Mayfield dam intending to use and divert the waters the Cowlitz River, without having first received a wat appropriation permit from the Supervisor of Water R sources, as required under R.C.W. 90.20.010 et seq.

VIII.

That the City of Tacoma has commenced construction the Mayfield dam with the intent of completing the two pr posed dams in six years, rather than the required thr years under its license, and with the intent of releasi much less water from the Mayfield dam than is requir under its license, and with the intent of adding addition generators to what is presently authorized under license, all without the approval of the Federal Pow Commission; that the City has applied to the Feder [fol. 156] Power Commission to amend its license in the respects but has not received Commission approval; th

the State of Washington is opposing such amendments along with other intervenors and has filed its complaint in intervention, a copy of which is attached hereto and marked Exhibit "K" and by reference is made a part hereof.

IX.

That the City of Tacoma threatens to commence operations in the river, which will immediately damage a state fish hatchery dedicated to a public use and will preclude its successful operation by interfering with migrating fish utilized and released by the hatchery, without having acquired the hatchery or the right to damage it.

X.

That the City of Tacoma proposes to construct two high level dams on the Cowlitz River, which is situated wholly within the State of Washington; that the Cowlitz River at, above, and below the proposed dam sites supports anadromous and resident species of fish valued in excess of $2,000,000 annually; that said fish constitute one of the state's most valuable natural resources which is the sole and exclusive property of the State of Washington; that if the City of Tacoma is allowed to proceed with the construction of said dams, there will result irreparable damage to the state's valuable fishery resources with no adequate remedy at law; that in addition to such damage, the State of Washington will suffer serious and irreparable damage and injury to its land, structures, and waters, with no adequate remedy at law.

Therefore, defendants pray judgment as follows:

1. That the Court appoint, at the expense of the City of [fol. 157] Tacoma, a representative taxpayer or taxpayers, and an attorney to represent them, to defend this action, and raise any defenses which may have been available at the time the taxpayers previously participated herein, or any defenses which have subsequently occurred.

2. That pursuant to R.C.W. 7.24.010 et seq., this Court test and determine the validity of Tacoma's Ordinance No.

14386, as amended, with respect to the City's right to construct two dams on the Cowlitz River, to issue bonds therefor, to condemn state land devoted to a public use, and to interfere with public navigation on the Cowlitz River.

3. That this Court test and determine whether the City of Tacoma, a political subdivision of the State of Washington, must comply with the navigation requirements of R.C.W. 80.40.010, must comply with the application and permit requirements under R.C.W. 90.28.010, must comply with the application and permit requirements under R.C.W. 90.28.060, must comply with the water appropriation application and permit requirements under R.C.W. 90.20.010, and whether plaintiff can condemn state lands devoted to a public use.

4. That the acts proposed in the City of Tacoma's Ordinance No. 14386, as amended, be adjudged unlawful, that the proposed bond issue be declared invalid, and that the City be permanently restrained and enjoined from further construction of the proposed dams, and from damaging state lands devoted to a public use; or, as an alternative, that the plaintiff be enjoined from further construction until state laws are complied with.

5. That the State of Washington be accorded such other and further relief as is appropriate and which the Court [fol. 157] may deem just and equitable, and that defendants recover their costs and disbursements as may be taxed herein.

Don Eastvold, Attorney General, Joseph T. Mijich, Assistant Attorney General, E. P. Donnelly, Assistant Attorney General, Richard F. Broz, Assistant Attorney General, Attorneys for Defendants.

Duly sworn to by John A. Biggs, jurat omitted in printing.

[File endorsement omitted]

[fol. 159] EXHIBIT "I" TO DEFENDANTS' ANSWER, ETC.

The following resolution of the STATE GAME COMMISSION for the State of Washington was adopted at its meeting held in Seattle, Washington on August 16, 1955

Motion by Snider, Seconded by Dow, that the City of Tacoma having expressed a need and desire to acquire the Mossyrock fish hatchery, held and operated by the State for Game Department purposes since 1941, which hatchery must be inundated and made completely useless by the Mayfield dam on the Cowlitz River is proposed by the City of Tacoma's ordinance No. 14386; and the Commission having instructed its Director to thoroughly investigate the feasibility of transferring said hatchery to said City pursuant to law; and the Director, after a thorough search and investigation, having reported:

(1) that no alternate hatchery site can be found which has values to any extent comparable to those of the Mossyrock site with respect to the unique character and location of the spring waters utilized there; and

(2) that the fish trapping and other operations being conducted on the Cowlitz River make the hatchery indispensable to the operations of the Department;

(3) that cyclic steelhead experiments carried on at the hatchery in connection with the Cowlitz River require the use of the hatchery for a period of years before any beneficial data can be obtained;

(4) that stocks of steelhead and cutthroat trout are being reared at the hatchery to further and to carry on the endeavors and purposes of the Department;

THEREFORE, the Commission finds the Mossyrock hatchery, in its present location, to be complete irreplaceable and essential to the maintenance of its fishery program on the Cowlitz River, and necessary for the purposes for which it was acquired, and instructs the Director to take every legal procedure to resist any effort on the part of the City

of Tacoma, or anyone else, to condemn or in any other man-
[fol. 160] ner acquire or impair the operations of the Mossyrock hatchery, as such acquisition or impairment would be disadvantageous to the State of Washington and inconsistent with the public interest.

WASHINGTON STATE GAME COMMISSION

/s/ Dr. W. R. Bernard
Chairman

/s/ Richard S. Seward
Member

/s/ J. A. Landon
Member

/s/ Walt Farron
Member

/s/ Claude C. Snider
Member

/s/ E. Sandow
Member

Dated at Seattle, Washington this 16th day of August, 1955.

[fol. 160A] EXHIBIT "J" TO DEFENDANTS' ANSWER, ETC.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

CHAMBERS OF
GEORGE H. BOLDT
UNITED STATES DISTRICT JUDGE
TACOMA, WASHINGTON

June 15, 1955

Re: City of Tacoma v. Severns, et al
W.D.S.D. #1892

To all counsel in above-entitled case:

As indicated at the argument, decision on defendants' motion to dismiss will not be delayed for preparation of a formal, detailed opinion. Because of the public importance

of the case the briefs submitted and the authorities cited have been carefully examined and the matter fully considered.

The motion to dismiss challenges the power and authority of the City to maintain a condemnation action in this court and the jurisdiction of this court to entertain such action. The questions presented are purely matters of law and leave no room for the exercise of discretion by this court. Unless the City is authorized by law to bring and maintain the action in this court and this court has been granted jurisdiction of the parties and subject matter, the motion to dismiss must be granted no matter how desirable or convenient the contrary ruling might be.

Under the Constitution and laws of the State of Washington, the City of Tacoma is a creature of the state and only has such powers and authority as the legislature has granted to it. Washington law authorizes cities to condemn properties for the purposes involved in this case but the statute (R.C.W. 8.12.050) specifically provides that for such condemnation "the city shall file a petition in the superior court of the county in which the land is situated." There is no other provision of state law pertaining to the subject and the quoted language is a mandatory limitation on the power to condemn.

[fol. 160B] The federal government does not have authority to remove limitations on the powers of Washington cities expressly provided by the legislature of that sovereign state. Accordingly, Section 814 of the Federal Power Act (Title 16 U.S.C.A.), which grants the right of eminent domain in district courts of the United States to licensees of the Federal Power Commission, does not remove or affect the limitations on the condemnation powers of Washington cities.

Inasmuch as the City of Tacoma is not authorized to bring or maintain this action in this court the motion to dismiss must be granted. The City is fully authorized by state statute to bring the action in the superior court for Lewis County, which court unquestionably has jurisdiction. In such state court action full consideration can be given to all public and private interests involved.

Order in conformity herewith may be presented forthwith.

Very truly yours,

/s/ George H. Boldt
George H. Boldt
United States District Judge

[fol. 160C] EXHIBIT "K" TO DEFENDANTS' ANSWER, ETC.

BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of	)	
	)	Project No. 2016
City of Tacoma, Washington	)	

PETITION TO INTERVENE

Don Eastvold
Attorney General
State of Washington

Joseph T. Mijich
Assistant Attorney General
State of Washington

Richard F. Broz
Assistant Attorney General
State of Washington

Attorneys for Intervenor
State of Washington

OFFICE AND POST OFFICE ADDRESS:

2018 Smith Tower
Seattle 4, Washington

Seattle, Washington
August , 1955

[fol. 160D] BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of	)	
	)	Project No. 2016
City of Tacoma, Washington	)	

Comes now the State of Washington, through its Attorney General and its Departments of Fisheries and Game, and in support of this petition alleges:

I.

That the petitioner, State of Washington, is a sovereign State of the United States, that the Attorney General is the legal representative of the State, charged with the duty of protecting the State's legal interests, and that the Departments of Fisheries and Game are agencies of the State, charged with the duty of enforcing its laws, rules and regulations relative to the conservation of food fish and game fish.

II.

That the City of Tacoma is a municipal corporation organized under the laws of the State of Washington.

III.

That the Cowlitz River is located wholly within the State of Washington. That the applicant has applied for and [fol. 160E] received from the Federal Power Commission a license for proposed project No. 2016, to be located on the Cowlitz River, which license was issued on November 28, 1951.

IV.

That the City of Tacoma's license, effective on January 1, 1952, provided that construction on the proposed project should start by January 1, 1954, and be completed within a period of thirty-six months. That on February 26, 1954, the Commission extended the time for commencing construction to December 31, 1955, but prior to granting said

extension did not hold any additional hearings on the application for extension.

V.

That on June 2, 1955, the licensee filed an application for amendment of license for Project No. 2016, which application, among other things, requests the Commission to amend Article 28 of its license to provide for the commencement of construction of the project within four (4) years of the effective date of the license, and to extend the time for the completion of the project works to six (6) years after commencement of construction. That said application requests the Commission to amend Article 35 (a) and (b) of the license to provide that:

> "(a) The natural flow of the river will be allowed to [fol. 160F] pass the Mayfield plant during the major portion of the construction period at that site. After completion of the Mayfield plant and previous to the completion of the Mossyrock plant, not less than the minimum recorded flow of the river will be released; and upon completion of the entire project the minimum release of water at the Mayfield plant shall be 2,000 cubic feet per second; and
>
> (b) Upon completion of the Mayfield plant, the rates of change of release of water from the plant shall not exceed that which will cause a change of water level at the City of Castle Rock, Washington, of one foot either up or down."

That in addition to the foregoing, the applicant has requested the Commission to authorize the installation of a fourth generating unit at both the Mayfield and Mossyrock sites of the proposed Cowlitz projects, which is one additional unit for each site above that authorized by the present license for the project. That the Departments of Fisheries and Game, by letter dated June 7, 1955, protested the granting of an extension of time to the applicant, and the amending of the water flow requirements.

VI.

That the anadromous fish populations of the State of Washington constitute its second most valuable natural [fol. 160G] natural resource. That fresh water spawning and rearing areas within the State which are suitable for the production of anadromous fish have been reduced to a critical point by past and current construction of dams and other factors, and species of anadromous fish are now in danger of extermination unless the remaining fresh water spawning and rearing environment is preserved. That the waters of the Cowlitz River and its drainage area above and below the proposed dam sites constitute a substantial portion of the suitable spawning and rearing areas remaining in the State, and the anadromous fish produced therein are of immense economic and recreational value to the people of this state and the nation. That the annual net dollar value of the Cowlitz River watershed due to fish has been estimated by the Federal Power Commission to be in excess of two million dollars ($2,000,000.00).

VII.

That there is presently in progress a ten year program for the rehabilitation of the fishery resources of the lower Columbia River watershed, of which the Cowlitz River and its tributaries is an integral part. That this program is being conducted by the States of Washington, Oregon, and Idaho with the cooperation of the United States Fish and Wildlife Service with federal funds, and contemplates the expenditure of twenty million dollars ($20,000,000.00). That [fol. 160H] the benefits to be derived from this program will be largely decreased if the potential of the Cowlitz River watershed as a producer of anadromous fish is substantially diminished. That there does not exist at the present time any suitable plan for the protection of anadromous fish in the Cowlitz River if the proposed project is carried to completion under the terms of its present license.

VIII

That since 1951, many new hydro-electric and other generating plans have been constructed in this area and are presently producing energy; that the said construction of new hydro-electrical and other generating plants since 1951 has materially diminished the available spawning areas for anadromous fish, which factor has caused the spawning areas in the Cowlitz River watershed to become much more valuable to the State of Washington for the reproduction of anadromous fish than it formerly was; that the proposed amendment to Article 28 of the applicant's license would, if granted, subject the anadromous fish runs in the Cowlitz River destined for the area above the Mayfield site to the extra hazards inherent in the construction of dam installations for a period of three years more than was contemplated in the present license; that the detrimental effects of altered flows, pollution, and diminished food production [fol. 160I] of the river bed which are inherent in dam construction will be multiplied in a ratio corresponding to any increase in time allowed for said construction; that there will be added damage to the fish in the Cowlitz River if an amendment is granted providing for an extension of time for construction, which damage will be directly attributable to said extension of time for construction; that the damage to the fish runs on the Cowlitz River caused by the proposed extension of time will be even more serious in view of the added value of the spawning areas of the Cowlitz, which is due to the aforesaid factors of added power facilities in the Northwest and the corresponding reduction of suitable spawning areas.

IX

That applicant's present license contemplates the concurrent construction of both the Mossyrock and Mayfield dams; that the applicant now seeks to have its license amended so as to provide for the construction of the Mayfield dam first; that the applicant has applied to the Commission for a modification of its minimum flow requirements during the period of construction of the Mayfield dam so that the required minimum release of water from the May-

field plant would not be less than the minimum recorded flow, which is 698 cubic feet per second rather than 2000 cubic feet per second as the license presently requires; that [fol. 160J] such an amendment to the license will permit the applicant to use the Mayfield plant as a peaking plant operation; that at certain times of the year, sufficient pondage could be provided for power production which would permit an operation in which there would be a diurnal fluctuation from the lowest recorded minimum flow of 698 cubic feet per second to the maximum flow from the turbines of approximately 13,000 cubic feet per second; that such an operation is contrary to the terms of the applicant's present license and to agreements reached at conferences in the offices of the Federal Power Commission; that such an operation would cause the stranding of both mature and juvenile fish which include migrating and spawning adult salmon, trout, and smelt, as well as young fish which are feeding in the river on their way to the ocean, both above and below the Mayfield site; that such an opera on will, during maximum flow releases, increase the velocity of the water in the river above those velocities normally encountered by adult migrating fish, which will result in excessive delays in the migration to the spawning area and reduced spawning efficiency; that spawning activities will be interrupted by such changes in velocity; that such fluctuations in the river will result in the exposing of salmon and trout redds to freezing desiccation, resulting in egg mortalities; that such fluctuations in the stream will cause siltation and stagnation of water in the gravel comprising spawning nests on the one hand, and erosion with subsequent exposure of the eggs on the other, which will result in further egg [fol. 160K] mortalities; that river bottom food production will be scoured by such operations and areas of fish food production will be subjected to daily drying by flows uncommon to the normal flow regime, which will seriously limit the survival of feeding juvenile fish in the river; that mortalities of young salmon and trout will be increased because of increased predation due to increased vulnerability in the restricted environment caused by daily fluctuations in the stream flow; that fluctuating flows will seriously reduce the spawning efficiency of Columbia River smelt,

by exposing the developing eggs to freezing and desiccation; that daily variations in flow patterns will have a serious detrimental effect upon the upstream migration of adult smelt; that if the proposed amendment relating to the minimum flow requirement is permitted, the fall and spring chinook, chum, and silver salmon runs will decline immediately; that the average annual wholesale income derived from fish produced in the Cowlitz River watershed that will be affected by the diurnal fluctuations resulting from said proposed amendment is approximately $1,936,000.00; that experience with similar operations demonstrates that, the annual loss to the fishery in the Cowlitz River and to the State of Washington due to operations which said amendment will permit will be approximately $1,047,848.00; that such a loss will be sustained by the State of Washington if the proposed amendment relating to required minimum flows is granted by the Commission.

[fol. 160L] That the applicant's request for a modification of the rate of change of water from the Mayfield plant, as set forth in its application for amendment to Article 35 (b), is unreasonable in that it fails to state a time or rate for its proposed release of water from the Mayfield plant; that without such an established rate of change it is impossible to ascertain the possible results of the requested modification; that the rate of change, if permitted in the form applicant requests, could totally destroy the fish runs in the Cowlitz River; that if either amendment to Article 35 (a) or 35 (b) is permitted, most or all of the benefits to be derived from the fishery protection plans for the Cowlitz River project will be destroyed.

XI

That the applicant's license for the proposed project was issued partially upon the finding of the Commission that a national emergency necessitated the additional power which the project could produce; that said license contemplated power from the project to be placed on the line by 1954; that the national emergency has passed, eliminating that consideration as a factor in determining whether or not the project should be built; that said license was issued

partially upon the finding of the Commission that there was an impending power shortage in the Northwest area; [fol. 160M] that changed conditions have eliminated a power shortage as a consideration in determining whether or not the project should be built; that the applicant cannot and will not comply with the present terms of its license for the proposed project, and its inability to do so will necessarily preclude the project from being the best plan adaptable to a comprehensive plan for improving or developing the waterways affected for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes and the conservation and propagation of fishery resources.

XII

That in view of the foregoing, the proposed project is unlawful, and not in the public interest.

XIII

That it is necessary, in order that the matters set forth herein be fully developed so that the Commission may have in its possession all material facts relating to this application, that the petitioner, State of Washington, be allowed to intervene in this matter.

Wherefore, this petitioner prays that the Commission set a date certain for a full hearing on the matters set forth herein and that this petitioner be allowed to appear as a [fol. 160N] party therein, that the Commission deny the applicant's application for amendment of license on project No. 2016, which amendment was filed with the Commission on June 2, 1955, and further pray that the Commission revoke the license of the City of Tacoma for Project No. 2016.

[fol. 160O]

Don Eastvold
Attorney General
State of Washington
Temple of Justice
Olympia, Washington

JOSEPH T. MIJICH
Assistant Attorney General
2018 Smith Tower
Seattle 4, Washington.

RICHARD F. BROZ
Assistant Attorney General
2018 Smith Tower
Seattle 4, Washington

[fol. 160P] *Duly sworn to by Joseph T. Mijich, John A. Biggs and Robert J. Schoettler, jurats omitted in printing.*

[fol. 160S] Certificate of service (omitted in printing).

[fol. 161] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

THE CITY OF TACOMA, a municipal corporation, Plaintiff,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a sovereign state, Defendants,

---

WASHINGTON STATE SPORTSMEN'S COUNCIL, INC., Intervener.

MOTION TO MAKE MORE DEFINITE AND CERTAIN—Filed September 6, 1955

Comes now the plaintiff City of Tacoma and moves that the defendants Director of Fisheries and Director of Game and the State of Washington be required to make their second affirmative defense to plaintiff's amended cross complaint more definite and certain by setting forth therein the nature and location of the State lands referred to therein and the public use to which it is claimed the same are dedicated.

This motion is based upon the files herein.

/s/ E. K. Murray, Special Counsel, /s/ Clarence Boyle, City Attorney, /s/ Frank L. Bannon, Chief Asst. City Attorney, /s/ Marshall McCormack, Chief Asst. City Attorney, Attorneys for Plaintiff.

/s/ Joseph T. Mijich

[File endorsement omitted]

[fol. 162] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, OF THURSTON COUNTY

[Title omitted]

MOTION TO STRIKE FROM DEFENDANT DIRECTORS' AND STATE'S THIRD AMENDED ANSWER AND CROSS-COMPLAINT—Filed September 6, 1955

Comes now the plaintiff City of Tacoma and moves to strike from the Third Amended Answer and Cross-Complaint of the Defendants Director of Fisheries and Director of Game and State of Washington filed herein August 29, 1955, as follows:

I.

The whole of the first and second affirmative defenses and of the cross-complaint, upon the grounds:

(1) That said defendants are guilty of laches, and have not timely or diligently presented the issues which they now seek to raise thereby.

(2) That such presentation at this time would unduly delay determination of the questions and declaration of the rights sought by plaintiff herein.

(3) That such amended cross-complaint seeking injunctive relief and the determination of complicated factual questions is not proper or authorized in this action for declaratory relief.

[fol. 163] (4) That the contentions made and positions taken by said defendants therein are contrary to the law of this case as established by the Supreme Court upon appeal heretofore taken herein.

(5) That the issues raised thereby have been determined adversely to said defendants by the Federal Power Commission and the Federal Courts, as set forth in plaintiff's complaint and amended complaint herein, and are now res adjudicata as to said defendants.

(6) That the matters set forth therein are incompetent, irrelevant and immaterial, and sham and frivolous.

II.

(1) The words "which the city is prohibited from doing under the provisions of R.C.W. 80.40.010" in said first affirmative defense;

(2) The words "which the plaintiff is unable to acquire" in said second affirmative defense;

(3) The words "that such interference is specifically prohibited under the provisions of R.C.W. 80.40.010" in paragraph III of said amended cross-complaint;

(4) The words "which the city is unable to acquire" in paragraph IV of said amended cross-complaint;

for the reason that the same, and each thereof, are mere conclusions of law on the part of said defendants.

III.

(1) The words "that the State Game Commission has passed a resolution resisting its acquisition by the City, a copy of which is attached hereto and marked Exhibit 'I' and incorporated by reference herein" in paragraph IV of said amended cross-complaint, together with such Exhibit "I";

[fol. 164] (2) The words "that the City has attempted to circumvent this statute by attempting to condemn part of said highway in federal court, which action was dismissed

by said court for the reason that 'The federal government does not have authority to remove limitations on the powers of Washington cities expressly provided by the legislature of that sovereign state', a copy of which opinion is attached hereto and marked Exhibit 'J' and incorporated by reference herein", in paragraph V of said amended cross-complaint, together with such Exhibit "J";

(3) The words "that the State of Washington is opposing such amendments along with other intervenors and has filed its complaint in intervention, a copy of which is attached hereto and marked Exhibit 'K' and by reference is made a part hereof", in paragraph VIII of said amended cross-complaint, together with such Exhibit "K";

for the reason that the same, and each thereof, are surplusage, and mere self-serving declarations or statements of position of said defendants, and that said defendants' attitude in such matters is not one for determination or declaration by this Court herein, and that such opinion is merely informal and interlocutory and not determinative of any of the issues herein.

IV

Paragraph VIII of said amended cross-complaint, and each and every part thereof, for the reason that the legislative declaration of "intent" of plaintiff's City Council as contained in said ordinances is conclusive and binding and not a judicial question for the Court in this cause, or for determination or declaration by the Court herein.

[fol. 165] V.

(1) Paragraph III of said amended cross-complaint, and each and every part thereof;

(2) Paragraph IV of said amended cross-complaint, and each and every part thereof;

(3) Paragraph V of said amended cross-complaint, and each and every part thereof;

(4) Paragraph VII of said amended cross-complaint, and each and every part thereof;

(5) Paragraph VIII of said amended cross-complaint, and each and every part thereof;

(6) Paragraph IX of said amended cross-complaint, and each and every part thereof;

(7) Paragraph X of said amended cross-complaint, and each and every part thereof;

for the reason that the matters set forth therein

(a) Assert postitions (sic) contrary to the law of this case as established by the Supreme Court upon appeal heretofore taken herein.

(b) Have been determined adversely to said defendants by the Federal Power Commission and the Federal Courts as set forth in plaintiff's complaint and amended complaint herein, and are now res adjudicata as to said defendants;

(c) Are incompetent, irrelevant and immaterial, and sham and frivolous.

This motion is based upon the files herein.

[fol. 166] /s/ E. K. Murray, Special Counsel, /s/ Clarence Boyle, City Attorney, /s/ Frank L. Bannon, Chief Asst. City Attorney, /s/ Marshall McCormack, Chief Asst. City Attorney, Attorneys for Plaintiff.

[File endorsement omitted]

[fol. 167] In the Superior Court of the State of Washington, of Thurston County

[Title omitted]

Demurrer to Affirmative Defenses and to Amended Cross-Complaint of Defendant Directors and State of Washington—Filed September 6, 1955

Comes now the plaintiff City of Tacoma and demurs:

(1) To the first affirmative defense;

(2) To the second affirmative defense;

(3) To the Amended Cross-Complaint;
contained in the Amended Answer and Cross-Complaint of the defendants Director of Fisheries and Director of Game and State of Washington filed herein August 29, 1955, upon the grounds;

(a) That the same and each thereof do not state facts sufficient to constitute a defense to plaintiff's amended complaint or a cause of action in cross-complaint against the plaintiff, and

(b) That such amended cross-complaint does not state a cause of action entitling said defendants to any relief under the Declaratory Judgment Act of the State of Washington.

[fol. 168] /s/ E. K. Murray, Special Counsel, /s/ Clarence Boyle, City Attorney, /s/ Frank L. Bannon, Chief Asst. City Attorney, /s/ Marshall Memack, Chief Asst. City Attorney, Attorneys for Plaintiff.

Joseph T. Mijich

[File endorsement omitted]

[fol. 174] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

DEFENDANTS' AMENDED ANSWER AND CROSS-COMPLAINT TO PLAINTIFF'S AMENDED COMPLAINT—Filed September 27, 1955

Come now the defendants, The State of Washington, a sovereign state, and Robert Schoettler, as State Director of Fisheries, and John A. Biggs, as State Director of Game, and by way of amended answer and cross complaint to and against the amended complaint of the plaintiff, and in compliance with plaintiff's motion to make more definite and certain, admit, deny, and allege as follows:

I.

The allegations contained in paragraph I of plaintiff's amended complaint are hereby admitted.

II.

The allegations contained in paragraph II of plaintiff's amended complaint are hereby admitted.

III.

Answering paragraph III of plaintiff's amended complaint, these answering defendants admit that plaintiff did all of the things therein set forth, but allege that said [fol. 175] Ordinance No. 14386, as amended, attempts to authorize and require unlawful acts as set forth in defendants' affirmative defenses.

IV.

The allegations contained in paragraph IV of plaintiff's amended complaint are hereby denied for the reason that plaintiff is not proceeding in accordance with the terms of its federal license, as is required by its ordinance.

V.

Answering paragraph V of plaintiff's amended complaint, these answering defendants admit:

That plaintiff, on August 6, 1948, filed with the Federal Power Commission its declaration of intention to construct the project described in its Ordinance No. 14386, and thereafter on December 28, 1948, applied to said Commission for a license; that on March 8, 1949, the Federal Power Commission made and entered the findings and order which are attached to plaintiff's original complaint and marked Exhibit "B"; that the Federal Power Commission rendered the opinion, issued the license, and issued the order denying rehearing, which are attached to plaintiff's original complaint and marked Exhibits "C", "D", and "E"; that the United States Court of Appeals reviewed the findings of the Federal Power Commission in 207 F. (2d) 391;

that on February 24, 1954, the Federal Power Commission issued the order attached to plaintiff's amended complaint and marked Exhibit "H"; however, these answering defendants deny each and every other allegation contained in said paragraph.

VI.

The allegations contained in paragraph VI of plaintiff's amended complaint are hereby admitted.

[fol. 176]

VII.

The allegations contained in paragraph VII of plaintiff's amended complaint are hereby denied.

VIII.

Answering paragraph VIII of plaintiff's amended complaint, these answering defendants admit that the Taxpayers and an attorney were heretofore appointed and participated herein, but allege that they were absolved from further participation upon motion of the plaintiff; but deny each and every other allegation contained therein.

AFFIRMATIVE DEFENSES

I.

As a first affirmative defense to plaintiff's amended complaint, defendants allege as follows:

That plaintiff is without authority to construct the proposed project on the Cowlitz River in that said project will interfere with public navigation on said river, which interference is prohibited under the provisions of R.C.W. 80.40.010.

II.

As a second affirmative defense to plaintiff's amended complaint, defendants allege as follows:

That even if plaintiff had the authority to construct the proposed project, it does not have the authority to condemn the following uses and lands owned by the State

of Washington which will necessarily be damaged, destroyed, or occupied by the project, and which plaintiff has taken no steps to acquire nor has the legislature au- [fol. 177] thorized such acquisition:

(a) The use of the bed of the Cowlitz River, a meandered stream, which is the property of the State of Washington, and which plaintiff has taken no steps to occupy;

(b) 5925.91 chains of state-owned shorelands of the Cowlitz River, a meandered stream, located in Township 12 North, Range 2; Township 12 North, Range 3; Township 12 North, Range 4; Township 11 North, Range 4; Township 11 North, Range 5; Township 12 North, Range 5, all East of the Willamette Meridian.

(c) 817.5 acres of school and granted lands, located in Township 12 North, Ranges 3 and 4 East of the Willamette Meridian.

(d) 557.71 acres of state-owned forest board lands set aside pursuant to legislative authority for reforestation purposes, located in Sections 19, 27, 28, and 30 of Township 12 North, Range 2 East of the Willamette Meridian in Lewis County, Washington.

(e) A state fish hatchery held for Game Department purposes with appurtenant water rights, devoted to the public use of trappings, rearing, propagating, and conserving game fish, comprising 74.10 acres, and located in Sections 8 and 11, Township 12 North, Range 2 East of the Willamette Meridian in Lewis County, Washington.

(f) A fish hatchery owned by the State of Washington Department of Fisheries devoted to the public use of trapping, propagating, and conserving food fish, and located in Section 29, Township 14 North, Range 10 East of the Willamette Meridian in Lewis County, Washington, at the junction of the Ohanapecoah River and Clear Fork Creek, which empty into the Cowlitz River.

(g) A partially completed hatchery owned by the State of Washington Department of Fisheries devoted to the public use of propagating and conserving food fish, comprising 8 acres more or less and upon which $106,000.00

more or less has been expended, and located in Sections 32 and 33, Township 13 North, Range 8 East of the Willamette [fol. 178] Meridian in Lewis County, Washington, at the junction of Johnson and Hall Creeks, which empty into the Cowlitz River.

(h) Approximately 19 miles of primary state highway no. 5; 3.36 miles of said highway are located in Sections 10, 16, 20, and 21 of Township 12 North, Range 2 East of the Willamette Meridian; 3.3 miles of said highway are located in Sections 14, 15, 22, 23, and 24 of Township 12 North, Range 3 East of the Willamette Meridian; 6.36 miles of said highway are located in Sections 19, 29, 30, 32, 33, 34, 35 and 36 of Township 12 North, Range 4 East of the Willamette Meridian; 1.36 miles of said highway are located in Sections 1 and 3 of Township 11 North, Range 4 East of the Willamette Meridian; 3.2 miles of said highway are located in Sections 29, 31, and 32 of Township 12 North, Range 5 East of the Willamette Meridian; 1 mile of said highway is located in Sections 2, 3, 4, 5, and 6 of Township 11 North, Range 5 East of the Willamette Meridian; all of said lands being located in Lewis County, Washington.

CROSS-COMPLAINT

As a further affirmative defense and by way of cross-complaint to plaintiff's amended complaint, defendants complain and allege as follows:

I.

That the State of Washington is a sovereign state of the United States and the City of Tacoma is a political subdivision thereof; that Robert Schoettler and John A. Biggs are the directors of the Departments of Fisheries and Game of the State of Washington, respectively.

[fol. 179]

II.

That notwithstanding the pendency of this action, and prior to any determination of their right so to do, the City of Tacoma entered into a construction contract on June 23, 1955, to build the first of two dams on the Cowlitz

River, which is the Mayfield Dam project, and is presently proceeding, and unless restrained by this Court, will continue to proceed with its construction until completion.

III.

That the Cowlitz River is used and is capable of use for public navigation; that the construction and operation of the project, as contemplated by Tacoma, will necessarily interfere with such public navigation; that such interference is specifically prohibited under the provisions of R.C.W. 80.40.010.

IV.

That the allegations contained in defendants' second affirmative defense on pages 3, 4, and 5 herein are hereby incorporated by reference and made a part of this cross complaint.

V.

That the project proposed in Tacoma's Ordinance No. 14386, as amended, will inundate and make completely useless a state fish hatchery, devoted to a public use, which the City is unable to acquire; that the State Game Commission has passed a resolution, resisting its acquisition by the City, a copy of which is attached hereto and marked Exhibit "I" and incorporated by reference herein.

[fol. 180]

VI.

That the construction commenced by the City of Tacoma will result in the inundation of several miles of primary state highway no. 5, which is state land presently devoted to a public use; that Tacoma has not filed an application with nor received approval from either the State Supervisor of Water Resources or the Director of Highways, as required by R.C.W. 90.28.010, to inundate said highway; that the City has attempted to circumvent this statute by attempting to condemn part of said highway in federal court, which action was dismissed by said court for the reason that "The federal government does not have authority

to remove limitations on the powers of Washington cities expressly provided by the legislature of that sovereign state", a copy of which opinion is attached hereto and marked Exhibit "J" and incorporated by reference herein.

VII.

That the City of Tacoma has commenced construction of the Mayfield Dam project without having first made application to or received approval from the Supervisor of Water Resources as to its safety, as required under R.C.W. 90.28.060; that pursuant to R.C.W. 90.28.060, such project would constitute a public nuisance which the state would be required to abate if such construction were allowed to proceed.

VIII.

That the City of Tacoma has commenced construction of the Mayfield Dam project intending to use and divert the waters of the Cowlitz River, without having first received a water appropriation permit from the Supervisor of Water Resources, as required under R.C.W. 90.20.010 *et seq.*

[fol. 181]

IX.

That the City of Tacoma has commenced construction of the Mayfield Dam project with the intent of completing the two proposed dams in six years, rather than the required three years under its license, and with the intent of releasing much less water from the Mayfield dam than is required under its license, and with the intent of adding additional generators to what is presently authorized under its license, all without the approval of the Federal Power Commission; that the City has applied to the Federal Power Commission to amend its license in these respects but has not received Commission approval; that the State of Washington is opposing such amendments along with other intervenors and has filed its complaint in intervention, a copy of which is attached hereto and marked Exhibit "K" and by reference is made a part hereof.

X.

That the City of Tacoma threatens to commence operations in the river, which will immediately damage a state fish hatchery dedicated to a public use and will preclude its successful operation by interfering with migrating fish utilized and released by the hatchery, without having acquired the hatchery or the right to damage it.

XI.

That the City of Tacoma proposes to construct two high level dams on the Cowlitz River, which is situated wholly within the State of Washington; that the Cowlitz River at, above, and below the proposed dam sites supports anadromous and resident species of fish valued in excess of $2,000,000 annually; that said fish constitute one of the state's most valuable natural resources which is the sole [fol. 182] and exclusive property of the State of Washington; that if the City of Tacoma is allowed to proceed with the construction of said dams, there will result irreparable damage to the state's valuable fishery resources with no adequate remedy at law; that in addition to such damage, the State of Washington will suffer serious and irreparable damage and injury to its land, structures, and waters, with no adequate remedy at law.

Therefore, defendants pray judgment as follows:

1. That the Court appoint, at the expense of the City of Tacoma, a representative taxpayer or taxpayers, and an attorney to represent them, to defend this action, and raise any defenses which may have been available at the time the taxpayers previously participated herein, or any defenses which have subsequently occurred; the defendants do not raise these defenses as it is the sole right and duty of the taxpayers to raise them.

2. That pursuant to R.C.W. 7.24.010 *et seq.*, this Court test and determine the validity of Tacoma's Ordinance No. 14386, as amended, with respect to the City's right to construct two dams on the Cowlitz River, to issue bonds therefor, to condemn state land devoted to a public use; and to interfere with public navigation on the Cowlitz River.

3. That this Court test and determine whether the City of Tacoma, a political subdivision of the State of Washington, must comply with the navigation requirements of R.C.W. 80.40.010, must comply with the application and permit requirements under R.C.W. 90.28.010, must comply with the application and permit requirements under R.C.W. 90.28.060, must comply with the water appropriation application and permit requirements under R.C.W. 90.20.010, and whether plaintiff can condemn state lands devoted to a public use.

4. That the acts proposed in the City of Tacoma's Or-
[fol. 183] dinance No. 14386, as amended, be adjudged unlawful, that the proposed bond issue be declared invalid, and that the City be permanently restrained and enjoined from further construction of the proposed dams, and from damaging state lands devoted to a public use.

5. That the State of Washington be accorded such other and further relief as is appropriate and which the Court may deem just and equitable, and that defendants recover their costs and disbursements as may be taxed herein.

Don Eastvold, Attorney General, Joseph T. Mijich, Assistant Attorney General, E. P. Donnelly, Assistant Attorney General, Attorneys for Defendants.

[fol. 184] *Duly sworn to by Robert J. Schoettler and John A. Biggs, jurats omitted in printing.*

[File endorsement omitted]

[fol. 185] Exhibit "I" Omitted. Printed side page 159 ante.

[fol. 187] Exhibit "J" Omitted. Printed side page 160a ante.

200

[fol. 188a] Exhibit "K" Omitted. Printed side page 160c ante.

[fol. 189] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

ORDER GRANTING MOTION TO MAKE MORE DEFINITE AND CERTAIN, DENYING MOTIONS TO STRIKE, AND OVERRULING DEMURRERS—October 3, 1955

This matter having regularly come on for hearing before the Court on September 12, 1955, upon plaintiff's motion to require the defendant Directors and the defendant State of Washington to make the second affirmative defense contained in their answer to plaintiff's amended complaint herein more definite and certain, and on plaintiff's motion to strike the first and second affirmative defenses and the cross-complaint contained in the answer and cross-complaint of said defendants, and the several parts thereof, and on plaintiff's demurrer to said affirmative defenses and cross-complaint, and further on plaintiff's motion to strike the petition in intervention of the intervener Washington State Sportsmen's Council, Inc., and the several parts thereof, and on plaintiff's demurrer to said intervener's petition in intervention, plaintiff appearing by E. K. Murray, Special Counsel, and Frank L. Bannon, Chief Assistant City Attorney, said defendant Directors and the defendant State of Washington appearing by Joseph T. Mijich, Assistant Attorney General, [fol. 190] said intervener appearing by Lee Olwell, its attorney, and the Court having heard the argument of counsel and being duly advised in the premises, it is

Ordered that plaintiff's said motion to make said second affirmative defense more definite and certain be and the same is hereby granted, and it is further

Ordered that plaintiff's said motion to strike the affirmative defenses and cross-complaint of said defendant Directors and defendant State of Washington, and the several parts thereof, be and the same is hereby denied, except as relates to said second affirmative defense, as to which said motion is held in abeyance pending the making of said

second affirmative defense more definite and certain as hereinabove required, and it is further

Ordered that plaintiff's said demurrer to said affirmative defenses and said cross-complaint of said defendant Directors and defendant State of Washington be and the same is hereby overruled, and it is further

Ordered that plaintiff's said motion to strike said complaint in intervention, and the several parts thereof, be and the same is hereby denied, and it is further

Ordered that plaintiff's demurrer to said complaint in intervention be and the same is hereby overruled.

To all of the above, except the granting of said motion to make definite and certain, plaintiff excepts, and its exceptions are allowed.

Dated October 3, 1955.

/s/ Charles T. Wright, Judge.

[fol. 191] Presented by:

E. K. Murray, Of Attorneys for Plaintiff.

Copy received

Joseph T. Mijich, Attorney for State of Washington, Director of Fisheries, Director of Game.

Copy received:

/s/ Lee Olwell, Attorney for Intervener.

[File endorsement omitted]

[fol. 196] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

CITY OF TACOMA, a municipal corporation, Plaintiff,

v.

TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a sovereign state, Defendants,

WASHINGTON STATE SPORTSMEN'S COUNCIL, INC. and the COLUMBIA RIVER TUNA AND SALMON PACKERS ASSOCIATION, Interveners.

No. 26572

RESTRAINING ORDER PENDENTE LITE—October 7, 1955

This matter coming on before the above entitled court on the 8th day of August, 1955 upon the motion of the defendant Directors of Fisheries and Game of the State of Washington, for a temporary restraining order and order to show cause returnable this date, and upon the motion of the plaintiff, City of Tacoma, to quash said temporary restraining order, the court having heretofore entered its modified restraining order, the plaintiff appearing by and through its attoneys, E. K. Murray, Special Counsel, and Frank L. Bannon, the defendant Directors appearing by and through their attorneys, Joseph T. Mijich and E. P. Donnelly, the court having heard arguments of counsel, and being fully advised in the premises does now

Order that, pendin the trial of the above entitled cause on its merits before this court, the plaintiff, its officers agents and employees be and it and they are enjoined from doing any act or thing in any manner interfering with the bed of waters of the Cowlitz River in connection with its Mayfield and Mossyrock Dam projects, or in any

[fol. 197] way injurious to fish runs or fish resources of said river, Provided However, that the plaintiff, its agents, employees and officers be and they are hereby authorized to construct the coffer dam for the powerhouse site and to do blasting necessary to construction, provided that no blasting shall take place in the waters of the Cowlitz River.

It Is Further Ordered that pursuant to the stipulation of the parties in open court on or about the 30th day of June, 1955, in open court made and as a condition to the modification of said temporary restraining order then made, it is understood that said defendants do not consent to or acquiesce in such amendment or modification, and that no legal rights of said defendants shall be deemed impaired thereby, nor said defendants deemed estopped to assert any defense therein which they could have asserted if such modification had not been made and that any expenditure made by the plaintiff pending the trial on this cause on its merits, be at its own hazard and shall not enhance its equitable position.

It Is Further Ordered that the plaintiff be and it is hereby allowed an exception to the refusal of the above entitled court to fully quash said restraining order and further, said defendants be and they are hereby allowed an exception to the action of the court modifying or amending said restraining order.

It Is Further Ordered that the parties hereto meet at 10:30 A. M., Tuesday, October 11, 1955, in this Court for a pre-trial conference.

[fol. 198] Done in open Court this 7th day of October, 1955.

/s/ Charles T. Wright

Approved as to form:

/s/ Joseph T. Mijich, Attorney for State of Washington.

Presented by:

E. K. Murray, /s/ Frank L. Bannon, Attorneys for Plaintiff.

Copy received

/s/ Olwell & Boyle.

[File endorsement omitted]

[fols. 199-200] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THURSTON COUNTY

[Title omitted]

ORDER APPOINTING ATTORNEYS FOR TAXPAYERS—
October 11, 1955

It appearing to the court from the pleadings in the above entitled action and from the statutes of the State of Washington made and provided under Title 7, Chapter 7.25, Revised Code of Washington, that it is requisite that the court enter an order naming one or more taxpayers of the City of Tacoma as representative of all taxpayers of the City of Tacoma, and appoint an attorney to represent them in the above entitled action, and it further appearing to the court that a complete determination of the issues in the action cannot be had without representation as so provided, and it further appearing to the court that the taxpayers heretofore appointed by the court as representative taxpayers have withdrawn from the proceedings and have defaulted any further action on their part, now, therefore,

It Is Ordered, Adjudged and Decreed That Lynch and Lynch, attorneys at law, 208 First National Bank Building, Olympia, Washington, shall defend the action on behalf of all taxpayers of the City of Tacoma, except such as may intervene as provided by law, and that they shall be allowed a reasonable fee and taxable costs to be taxed against the plaintiff.

It Is Further Ordered, Adjudged and Decreed That the attorneys' fees and all taxable costs incurred in said action shall be taxed against the plaintiff, to which plaintiff excepts & exception allowed.

Done in open court this 11th day of October, 1955.

/s/ Charles T. Wright, Judge.

[fol. 201] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

PLAINTIFF'S REPLY TO AFFIRMATIVE DEFENSES AND ANSWER TO AMENDED CROSS-COMPLAINT OF DEFENDANTS DIRECTORS AND STATE OF WASHINGTON—Filed October 3, 1955

Comes now plaintiff City of Tacoma and, still maintaining the legal position taken upon its motion to strike therefrom and demurrer thereto, for reply to the affirmative defenses contained in the amended answer of the defendants Director of Fisheries and Director of Game and State of Washington to plaintiff's amended complaint filed herein, denies and alleges as follows:

Reply to Affirmative Defenses

I

Denies all the allegations and assertions contained in such first affirmative defense, and in respect thereto alleges that such project will instead greatly aid and benefit navigation.

[fol. 202] II

Referring to the allegations contained in such second affirmative defense, denies the same, except that plaintiff is as yet not fully informed as to the full extent of lands owned by the State in the area of such project, but admits that the State owns some river beds, shore lands, school and granted lands, reforestation lands, parts of a fish hatchery site and highways therein, and that such highways are devoted to the public use, and plaintiff particularly denies that it is without authority to acquire such lands, either by negotiation and purchase or eminent domain, and in respect thereto alleges that the use to which it proposes to put any such lands necessary for such project is a superior public use under the laws of the United States and the State of Washington, and that all such lands will be acquired by plaintiff by negotiation and

purchase or eminent domain in the due course of the construction and development of such project and full compensation made and paid therefor before any taking or damaging thereof, and that this is not the proper proceeding or tribunal for the determination of any such suit or question pertaining thereto.

Answer to Cross-Complaint

And for answer to the amended cross-complaint of said defendants verified September ——, 1955, and filed herein, plaintiff admits, denies and alleges as follows:

III

Admits the allegations contained in paragraph I thereof.

IV

Denies all the allegations and assertions contained in [fol. 203] paragraph II thereof, except that plaintiff admits that it has entered into a construction contract for the first of said dams and is presently proceeding therewith in conformity with the previous decision and orders in this cause, but that actual construction of said dam has not as yet been commenced, and in respect thereto alleges that all issues raised in this proceeding prior to the letting of such contract were declared in this cause prior thereto, and that all other issues herein were raised for the first time after plaintiff let such construction contract.

V

Referring to the allegations contained in paragraph III thereof, admits that said river is used and capable of use for navigation, and denies all of the other allegations and assertions therein contained, and alleges in respect thereto that plaintiff's proposed project will greatly aid and benefit navigation on said river rather than interfere therewith.

VI

Referring to the allegations contained in paragraph IV thereof, admits, denies and alleges with reference thereto as is hereinabove set forth in paragraphs I and II hereof.

VII

Denies all the allegations and assertions contained in paragraph V thereof, except that plaintiff admits the recent passage by the Game Commission of the resolution referred to therein, and plaintiff particularly denies that such project will wholly inundate and make completely useless a State fish hatchery, or that plaintiff is without authority or unable to purchase or acquire the same, or the necessary rights to alter, adjust or provide for the relocation thereof, either by negotiation and purchase or [fol. 204] eminent domain, and in respect thereto alleges that plaintiff has not as yet entered into negotiations with said Game Commission relating to the alteration, adjustment, relocation or acquisition of such fish hatchery, and that continued full use of such hatchery can be had through proper adjustments and partial relocation of parts thereof without diminishing the usefulness thereof, and that the passage of such resolution was premature and apparently for the purpose of attempting to influence this action, and that plaintiff intends to and will acquire, either through negotiation and purchase or eminent domain proceedings, instituted and prosecuted in the proper tribunal, any and all necessary rights to take or damage such hatchery or any part thereof, and will make and pay full compensation therefor before any taking or damaging thereof, and that this declaratory judgment action is not the proper proceeding nor this Court the proper tribunal for the determination of any issue or issues, if any there be, that may arise in connection therewith.

VIII

Referring to the allegations contained in paragraph VI thereof, admits that such project when completed will result in the inundation of several miles of State highway, and denies all the other allegations and assertions therein contained, and in respect thereto alleges that plaintiff has heretofore entered into negotiations with the State Director of Highways looking to the acquisition and relocation of such highways, and that such negotiations are now proceeding, and that it is plaintiff's intention to and it

will fully comply with all applicable laws for the acquisi-
[fol. 205] tion and relocation of such highways and the making and paying of full compensation therefor, before any inundation or taking or damaging thereof.

IX

Referring to the allegations and assertions contained in paragraph VII thereof, denies the same, and in respect thereto alleges that plans and specifications for such dam have been submitted to said Supervisor in accordance with the provisions of said statute, and that construction work on such dam has not been commenced and is not planned prior to approval of such plans and specifications.

X

Admits the allegations contained in paragraph VIII thereof, except that plaintiff denies that actual construction on said dam has commenced, but alleges in respect thereto that such project is under the exclusive jurisdiction of the Federal Power Commission and is authorized by License issued to plaintiff therefor, and that no such permit from said Supervisor is required by plaintiff, and that such is the law of this case.

XI

Denies all of the allegations and assertions contained in paragraph IX thereof, except that plaintiff admits that it has commenced initial construction of said project and has made application to said Commission for certain amendments to its License, including an extension of time largely made necessary by defendant Directors continued personal opposition to such project, and that the State and the intervener Washington State Sportsmen's Council, Inc., have petitioned for permission to intervene in oppo-
[fol. 206] sition to such amendments, and that action on such application and petitions is now pending, and plaintiff particularly denies that it has committed itself or intends to construct such project other than as is or may be authorized by such License, and in respect thereto alleges that its intentions are and can be determined and

expressed only by its ordinances duly passed, copies of which are attached to its pleadings herein.

XII

Denies all the allegations and assertions contained in paragraph X thereof, and particularly denies that it intends or plans to commence operations of said project or in said river, which will result in any immediate or other damage to a State fish hatchery or which will preclude its successful operation by interfering with migrating fish utilized and released by such hatchery, prior to acquiring all necessary property and rights in connection therewith, either by negotiation and purchase or appropriate proceedings in eminent domain instituted and prosecuted in the proper tribunal, and the making and payment of full compensation therefor, and in respect to such hatchery alleges that continued full use thereof can be had through proper adjustments and partial relocation of parts thereof without diminishing the usefulness thereof.

XIII

Denies all the allegations and assertions contained in paragraph XI thereof, except that plaintiff admits it proposed to construct said project as set forth in the ordinance providing therefor, and that the same is located wholly within the State of Washington, and that such river supports anadromous and resident species of fish, [fol. 207] and particularly denies that construction of such project will result in irreparable or any damage to the fishery resources of the State, or that the State will be otherwise damaged or injured thereby, and plaintiff alleges in respect thereto that said project constitutes the best adapted use of the waters of said river and will produce greater public benefits than any other plan for the use thereof.

Affirmative Defenses to Amended Cross-Complaint

And for affirmative defenses to said amended cross-complaint, plaintiff alleges:

First

That said amended cross-complaint does not state facts sufficient to constitute a cross-complaint, nor to entitle said defendants to any declaratory relief herein.

Second

That this action has been pending for over three years and said defendants are guilty of laches, and have not timely or diligently presented the issues which they now seek to assert herein.

Third

That the contentions now made by said defendants in what is their fifth cross-complaint herein are contrary to the law of this case as established by the Supreme Court upon prior appeal herein.

Fourth

That all matters set forth and all issues raised by said defendants in said amended cross-complaint were litigated and decided adversely to said defendants in that certain proceeding before the Federal Power Commission entitled "In the Matter of the City of Tacoma, Washington", Docket [fol. 208] No. E6156 of said Commission, a copy of which is attached to the complaint herein and marked Exhibit B, and further in that certain proceeding in which said defendant Directors were parties before said Commission entitled "In the Matter of the City of Tacoma, Washington", Project No. 2016 of said Commission, as shown by the Opinion, Findings, Order and License of said Commission in said proceeding dated November 28, 1951, copies of which are attached to the complaint herein and marked Exhibit "C", "D", and "E", and as further decided and adjudicated on review of said Order and Findings by the United States Court of Appeals for the Ninth Circuit by decision dated October 5, 1953 (207 Fed. (2d) 391), in that certain cause entitled "State of Washington Department of Game; State of Washington Department of Fisheries; and Washington State Sportsmen's Council, Inc., a corporation,

Petitioners, vs. Federal Power Commission, Respondent, City of Tacoma, Washington, Intervener", cause No. 13, 289 of said Court (Certiorari denied by U. S. Supreme Court April 5, 1954, 98 L. Ed. 513), and that all of the findings and conclusions in said proceedings are final and binding and res adjudicata as to said defendants.

Wherefore, plaintiff prays for judgment as prayed for in its amended complaint herein, that said defendants' amended cross-complaint be dismissed, that said defendants take nothing thereby, that plaintiff have and recover its costs and disbursements herein against said defendants, and for such other and further relief as to the Court may seem just.

/s/ Frank L. Bannon, Chief Assistant City Attorney, one of the Attorneys for Plaintiff.

[fol. 209] *Duly sworn to by H. M. Tollefson, jurat omitted in printing.*

[fol. 210] [File endorsement omitted]

Certificate of service (omitted in printing).

[fol. 211] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

DEMURRER TO PLAINTIFF'S REPLY TO AFFIRMATIVE DEFENSES AND ANSWER TO AMENDED CROSS-COMPLAINT OF DEFENDANTS—Filed October 11, 1955

Come now the defendants, The State of Washington, a sovereign state, and The Directors of Fisheries and Game, and demurrer to all the affirmative matter set forth in plaintiff's reply and answer for the following reasons:

I.

That all affirmative matter set forth in plaintiff's reply and answer does not state facts sufficient to constitute a defense to defendants' affirmative defenses and cross-complaint.

Don Eastvold, Attorney General, /s/ Joseph T. Mijich, Assistant Attorney General, E. P. Donnelly, Assistant Attorney General, Attorneys for Defendants.

Proof of Service (omitted in printing).

[fol. 212] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

MOTION TO STRIKE FROM PLAINTIFF'S REPLY AND ANSWER—Filed October 11, 1955

Come now the defendants, The State of Washington, a sovereign state, and Robert J. Schoettler, the State Director of Fisherires, (sic) and John A. Biggs, the State Director of Game, and move to strike from plaintiff's reply to affirmative defenses and answer to amended cross complaint of defendants, as follows:

I.

The following words from Paragraph II of plaintiff's reply to affirmative defenses:

"and in respect thereto alleges that the use to which it proposes to put any such lands necessary for such project is a superior public use under the laws of the United States and the State of Washington."

"and that this is not the proper proceeding or tribunal for the determination of any such suit or question pertaining thereto."

II.

The following words in Paragraph IV of plaintiff's answer to cross-complaint:

[fol. 213] "and in respect thereto alleges that all issues raised in this proceeding prior to the letting of such contract were declared in this cause prior thereto, and that all other issues herein were raised for the first time after plaintiff let such construction contract."

III.

The following words in Paragraph VII of plaintiff's answer to cross-complaint:

"and in respect thereto alleges that plaintiff has not as yet entered into negotiations with said Game Commission relating to the alteration, adjustment, relocation or acquisition of such fish hatchery, and that continued full use of such hatchery can be had through proper adjustments and partial relocation of parts thereof without diminishing the usefulness thereof, and that the passage of such resolution was premature and apparently for the purpose of attempting to influence this action, and that plaintiff intends to and will acquire, either through negotiation and purchase or eminent domain proceedings, instituted and prosecuted in the proper tribunal, any and all necessary rights to take or damage such hatchery or any part thereof, and will make and pay full compensation therefor before any taking or damaging thereof, and that this declaratory judgment action is not the proper proceeding nor this Court the proper tribunal for the determination of any issue or issues, if any there be, that may arise in connection therewith."

IV.

The following words in Paragraph X of plaintiff's answer to cross-complaint:

"but alleges in respect thereto that such project is under the exclusive jurisdiction of the Federal Power

Commission and is authorized by License issued to plaintiff therefor, and that no such permit from said Supervisor is required by plaintiff, and that such is the law of this case."

V.

The following words in Paragraph XII of plaintiff's answer to cross-complaint:

"and in respect to such hatchery alleges that continued full use thereof can be had through proper adjustments and partial relocation of parts thereof without diminishing the usefulness thereof."

[fol. 213A]

VI.

The following words in Paragraph XIII of plaintiff's answer and cross-complaint:

"and plaintiff alleges in respect thereto that said project constitutes the best adapted use of the waters of said river and will produce greater public benefits than any other plan for the use thereof."

VII.

The whole of the first, second, third, and fourth affirmative defenses of plaintiff's answer to cross-complaint.

This motion to strike is based upon the grounds that each of the allegations requested to be stricken by the defendants are sham, frivolous, irrelevant, and conclusions of law.

This motion is based upon the files herein.

Don Eastvold, Attorney General, /s/ Joseph T. Mijich, Assistant Attorney General, E. P. Donnelly, Assistant Attorney General, Attorneys for Defendants.

Proof of service (omitted in printing).

[File endorsement omitted]

[fol. 214] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THURSTON COUNTY

[Title omitted]

ORDER GRANTING MOTION TO STRIKE CERTAIN PORTIONS OF PLAINTIFF'S ANSWER TO DEFENDANTS' CROSS COMPLAINT—November 8, 1955

This matter having regularly come on for hearing before the Court on October 11, 1955, upon defendant Directors' of Fisheries and Game and defendant State of Washington's, hereinafter referred to as defendants, motion to strike certain affirmative matter in plaintiff's reply and answer and also upon defendants' demurrer to all affirmative matter in plaintiff's reply to affirmative defenses and answer to amended cross complaint of defendants; plaintiff appearing by E. K. Murray, Special Counsel, and Frank L. Bannon, Chief Assistant City Attorney, and defendants appearing by Joseph T. Mijich and E. F. Donnelly, Assistant Attorneys General, and the Court having heard the argument of counsel and having been duly advised in the premises, and the argument on said motion and demurrer being combined on the basis that all affirmative matter in plaintiff's reply and answer should be stricken, it is

Ordered that defendants' motion to strike be partially granted in the following particulars:

That the whole of the first, second, third, and fourth affirmative defenses of plaintiff's answer to defendants' [fol. 215] amended cross complaint be stricken, and that the motion to strike the remaining affirmative matter in plaintiff's reply and answer be overruled.

Dated this 8th day of November, 1955.

/s/ Charles T. Wright, Judge.

Presented by:

/s/ Joseph T. Mijich, Of attorneys for defendants.

Copy received and notice of presentation waived.

/s/ E. K. Murray, Of attorneys for plaintiff.

[File endorsement omitted]

[fol. 220] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

PETITION—Filed November 18, 1955

Whereas, by order of February 8, 1952, Judge Rummel of the Superior Court of Pierce County entered an order appointing four taxpayers of the City of Tacoma, to-wit, J. Ralph Williams, Robert L. Fox, Chester C. Paulson, and E. R. McKee, petitioners herein, to represent all taxpayers of said City in the above action, and

Whereas, the venue of the above action was subsequently transferred to Thurston County and, after further proceedings in the case, on April 29, 1954, Judge Wright of the Superior Court of Thurston County entered the following order with respect to said named taxpayers:

> "Ordered that said defendants be and they are hereby absolved from any further defense or prosecution of this action, and it is further
>
> "Ordered that the liability of plaintiff for costs for any further or additional services of the attorney for said defendants be and the same is hereby terminated, and it is further
>
> "Ordered that a hearing for fixing and determining the costs to be allowed said defendants herein for attorneys' fees and other court costs be and the same is hereby fixed for such other time as may be mutually agreed upon between the Court and counsel." and

[fol. 221] Whereas, it is the understanding of the undersigned petitioners that although they have been absolved from further participation in the proceedings, they have not been dismissed and are still representing all the taxpayers of the City of Tacoma in the above action, and

Whereas, J. Ralph Williams, Robert L. Fox, and Chester C. Paulson no longer desire to be named on the record as representing all the taxpayers of the City of Tacoma in

the above action, but, inasmuch as new issues have been raised herein, E. R. McKee does desire to remain on the record as representing all of said taxpayers in conformance with R.C.W. 7.24.160,

Now, Therefore, the undersigned hereby petition this Court to dismiss J. Ralph Williams, Robert L. Fox, and Chester C. Paulson from the above case as representatives of all the taxpayers of the City of Tacoma, and to continue or reinstate E. R. McKee as the representative of all the taxpayers of the City of Tacoma pursuant to R.C.W. 7.24.160, with costs and attorney's fees of said named taxpayer to be paid by the plaintiff herein.

Signed this 17th day of November, 1955.

/s/ J. Ralph Williams, /s/ Robert L. Fox, /s/ Chester C. Paulson, /s/ E. R. McKee.

[File endorsement omitted]

[fol. 222] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF THURSTON

THE CITY OF TACOMA, a municipal corporation, Plaintiff,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a sovereign state, Defendants.

ANSWER AND AFFIRMATIVE DEFENSE OF DEFENDANT TAXPAYERS—Filed November 30, 1955

Comes now E. R. McKee, representative taxpayer for the defendant taxpayers of Tacoma, Washington, and answering plaintiff's amended complaint of August 3, 1955, alleges and states:

I.

Admits the allegations of paragraphs I, II and III.

II.

Admits the allegations of paragraph IV except that defendant does not know of the existence of any surplus funds of the electric generating plant for construction purposes and denies that portion thereof.

III.

Admits the allegations of paragraphs V and VI.

IV.

Answering paragraph VII of the complaint defendant admits that the provisions of R.C.W. 75.20.010 et seq., as therein set forth, are contrary to and in direct conflict with the provisions of the Federal Power Act and inoperative, but denies the balance of said paragraph.

V.

Answering paragraph VIII defendant admits the allegations contained in the first sub-paragraph thereof, but as to the second paragraph denies the same, and particularly [fol. 223] denies that all issues proper for determination affecting the taxpayers have been decided heretofore in the above entitled action.

Further answering and by way of affirmative defense, the defendant alleges and states:

I.

That plaintiff is a municipal corporation duly existing under and by virtue of the laws of the State of Washington, and maintaining and operating public utilities, including electrical generation and distribution systems, and that the authority of the City to operate and maintain such electrical generation and distribution systems rests on the grant of authority given under Chapter 80.40 R.C.W.

II.

That the Cowlitz River is a navigable river at the situs of both of the proposed dams.

III.

That both of the proposed dams are of concrete structure which will completely barricade the course of the river, and that their construction will impede, obstruct and interfere with public navigation of the Cowlitz River, which impediment, obstruction and interference is contrary to the provisions of R.C.W. 80.140.010.

As a second affirmative defense to plaintiff's amended complaint, defendant alleges and states:

I.

That the plaintiff is a municipal corporation organized and existing under and by virtue of the power granted to it by the State of Washington, a sovereign state, and that as such it has only such authority as is granted by law or authorized by its charter, and not inconsistent with the state's general laws.

[fols. 224-5] II.

That the State of Washington in its sovereign capacity, owns and holds certain properties and lands, all as more specifically set forth in the second affirmative defense of the State of Washington's amended answer and cross-complaint dated September 26, 1955, in a governmental capacity, which properties are in the bed of the river and shorelands, or will be flooded by the structures proposed to be constructed by the plaintiff; that the State of Washington by and through its elective and appointed officers, has signified its intention to continue its ownership and control of these properties and to resist any transfer of these properties to plaintiff by negotiation or by eminent domain.

III.

That the State of Washington holds title to said properties in a governmental capacity and that they are dedi-

cated to public use and are not susceptible to eminent domain by the plaintiff.

IV.

That notwithstanding the fact that plaintiff does not have title to said property held by the State of Washington in a governmental capacity that it has transferred, and proposes to continue to transfer, certain funds of the City of Tacoma, and further proposes to issue and sell revenue bonds and securities, and use the moneys received therefrom in construction of said projects, hoping and anticipating that satisfactory arrangements can later be made to acquire the state properties by negotiation and, if not, by eminent domain.

V.

That notwithstanding the pendency of this action and prior to any final determination as to the rights of plaintiff, plaintiff entered into a construction contract on June 23, 1955 and is expending public moneys of the City of Tacoma theretofore transferred from other funds of the City of Tacoma to the Cowlitz Development Fund for construction of the Mayfield Dam project, and is presently proceeding with said construction and unless restrained will [fol. 226] continue to proceed with its construction and exhaust moneys otherwise held by the City of Tacoma for the use and benefit of defendant and other taxpayers of the City of Tacoma.

VI.

That the issuance of bonds and securities or the transferral of moneys from other public funds into the Cowlitz Power Development without first obtaining a legal determination of the right, if any, of the plaintiff to acquire the state publicly owned lands constitutes a gross abuse of discretion and judgment, and that the action of issuing bonds and transfer of moneys prior to acquisition of title of said property is arbitrary and capricious and will adversely affect the credit and good name of plaintiff and

the taxpayers and citizens of the City of Tacoma, and is illegal and void.

Wherefore Defendant prays:

1.

That an order may be entered in the above entitled action denying plaintiff's complaint.

2.

That an order be entered forthwith restraining and enjoining plaintiff from further expenditure of funds or issuance of bonds or securities.

3.

For such further relief as may be proper.

Lynch and Lynch, Attorneys for Defendant Taxpayer.

[fol. 227] *Duly sworn to by E. R. McKee, jurat omitted in printing.*

[File endorsement omitted]

[fol. 232] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

MOTION TO STRIKE ANSWER AND AFFIRMATIVE DEFENSE OF DEFENDANT TAXPAYERS—Filed December 9, 1955

Comes now the plaintiff City of Tacoma and moves to strike the answer and affirmative defense of defendant taxpayers made by defendant taxpayer E. R. McKee and filed herein November 30, 1955, as follows:

I.

The whole thereof upon the following grounds:

(1) That the same is not timely made nor made through proper counsel for said party, nor permission for the filing thereof obtained.

(2) That such answer and the affirmative defenses therein set forth are inconsistent with the order of this Court entered herein April 29, 1954, pursuant to the remittitur of the Supreme Court in this cause.

(3) That the contentions made and position taken therein by said defendant are contrary to the law of this case as established in the Supreme Court on appeal heretofore taken herein.

(4) That the issues raised thereby have been determined adversely to said defendant by the Federal Power Commission and the Federal Courts, as set forth in plaintiff's complaint and amended complaint herein, and are now res adjudicata as to said defendant.

(5) That said answer and affirmative defenses seek in- [fol. 233] junctive relief and the determination of complicated factual questions not proper or authorized in this action for declaratory relief only.

(6) That the matters set forth in said affirmative defenses are incompetent, irrelevant and immaterial, and sham and frivolous.

II.

(1) The words "that the authority of the City to operate and maintain such electrical generation and distribution systems rests on the grant of authority given under Chapter 80.40 R.C.W." in paragraph I of the first affirmative defense;

(2) The words "which impediment, obstruction and interference is contrary to the provisions of R.C.W. 80.140.010" in paragraph III of the first affirmative defense;

(3) The whole of paragraph I of the second affirmative defense;

(4) The whole of paragraph III of the second affirmative defense;

for the reason that the same, and each thereof, are mere conclusions of law on the part of said defendant.

III.

The whole of paragraphs II, III, IV, V and VI of the second affirmative defense, for the reason that the same and each thereof

(1) assert positions contrary to the law of this case as established by the Supreme Court upon appeal heretofore taken herein;

(2) have been determined adversely to said defendant by the Federal Power Commission and the Federal Courts as set forth in plaintiff's complaint and amended complaint herein, and are res adjudicata as to said defendant;

(3) are incompetent, irrelevant and immaterial, and sham and frivolous.

[fol. 234] IV.

The whole of paragraphs IV, V and VI of the second affirmative defense for the reason that the legislative declaration of purpose and intent as contained in the cited ordinances of the plaintiff City are conclusive and binding in this cause, and the issues which said defendant seeks to raise in said paragraphs are not judicial questions for the Court in this cause, or for determination or declaration by the Court herein.

This motion is based upon the files herein.

E. K. Murray, Special Counsel, Clarence M. Boyle, City Attorney, Marshall McCormick, Chief Assistant City Attorney, Frank L. Bannon, Chief Assistant City Attorney.

Proof of service (omitted in printing).

[File endorsement omitted]

[fol. 235] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

DEMURRER TO AFFIRMATIVE DEFENSES OF DEFENDANT TAXPAYER E. R. McKEE—Filed December 9, 1955

Comes now the plaintiff City of Tacoma and demurs to the affirmative defenses contained in the answer and affirmative defense of the defendant taxpayer E. R. McKee filed herein November 30, 1955, upon the grounds:

(1) That this court is without jurisdiction in this cause to hear or entertain said affirmative defenses;

(2) That the same, and each thereof, do not state facts sufficient to constitute a defense to plaintiff's amended complaint;

(3) That said affirmative defenses do not state facts entitling said defendant to any relief under the Declaratory Judgment Act of the State of Washington.

E. K. Murray, Special Counsel, Clarence M. Boyle, City Attorney, Marshall McCormick, Chief Assistant City Attorney, Frank L. Bannon, Chief Assistant City Attorney.

Proof of service (omitted in printing).

[fol. 238] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

PLAINTIFF'S REPLY TO ANSWER AND AFFIRMATIVE DEFENSE OF DEFENDANT TAXPAYER E. R. McKEE—Filed December 14, 1955

Comes now the plaintiff City of Tacoma and, still maintaining the legal position taken upon its motion to strike

and demurrer thereto, for reply to the answer and affirmative defenses of the defendant taxpayer E. R. McKee, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph I of the first affirmative defense and in paragraph I of the second affirmative defense.

II.

Referring to the allegations contained in paragraph II of the first affirmative defense, denies that said Cowlitz River is navigable at the situs of said proposed dams within the meaning of the laws of the State of Washington.

III.

Referring to the allegations contained in paragraph III of the first affirmative defense, admits that both of the proposed dams are concrete structures and that no navigation locks are provided therein, and denies the other allegations contained therein, and alleges in respect there- [fol. 239] to that plaintiff's proposed project will greatly aid and benefit navigation on said river rather than impede, obstruct or interfere therewith.

IV.

Referring to the allegations contained in paragraphs II and III of of (sic) the second affirmative defense, denies the same, except that plaintiff is as yet not fully informed as to the full extent of lands owned by the State in the area of such project, but admits that the State owns some river beds, shore lands, school and granted lands, reforestation lands, parts of a fish hatchery site and highways therein, and that such highways are devoted to the public use, and plaintiff particularly denies that it is without authority to acquire such lands, either by negotiation and purchase

or eminent domain, and in respect thereto alleges that the use to which it proposes to put any such lands necessary for such project is a superior public use under the laws of the United States and the State of Washington, and that all such lands will be acquired by plaintiff by negotiation and purchase or eminent domain in the due course of the construction and development of such project and full compensation made and paid therefor before any taking or damaging thereof, and that this is not the proper proceeding or tribunal for the determination of any such suit or question pertaining thereto.

V.

Referring to the allegations contained in paragraph IV of the second affirmative defense, admits that plaintiff has not as yet acquired title to lands held by the State and which will be affected by said project, and that it proposes to use surplus funds of its light utility and to issue and sell revenue bonds as provided in its ordinance No. 14386, as amended, for the purposes stated in said ordi- [fol. 240] nance, and denies the other allegations and assertions contained in said paragraph IV.

VI.

Referring to the allegations contained in paragraph V of the second affirmative defense, admits that on or about June 23, 1955, plaintiff entered into a contract for construction of said Mayfield Dam, and that plaintiff is presently proceeding with certain preliminary work relating thereto, and that it intends to continue to do so unless restrained, and denies the other allegations and assertions contained in said paragraph.

VII.

Denies the allegations and assertions contained in paragraph VI of the second affirmative defense.

Wherefore, plaintiff prays for judgment as prayed for in its amended complaint herein, and that plaintiff have and recover its costs and disbursements herein against

defendants, and for such other and further relief as to the Court may seem just in the premises.

E. K. Murray, Special Counsel, Clarence M. Boyle, City Attorney, Marshall McCormick, Chief Assistant City Attorney, Frank L. Bannon, Chief Assistant City Attorney, Attorneys for Plaintiff.

[fol. 241] *Duly sworn to by H. M. Tollefson, jurat omitted in printing.*

Proof of service (omitted in printing).

[File endorsement omitted]

[fol. 242] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

PRETRIAL CONFERENCE STIPULATION AND ORDER—
December 30, 1955

Pursuant to pretrial conferences between the Court and counsel for the parties herein, the following matters are agreed upon, and, insofar as the same are material to the issues herein, no further proof thereof, except as otherwise noted herein, need be produced at the trial herein, to wit:

1. The City of Tacoma entered into a construction contract on June 23, 1955, to build the first of two dams on the Cowlitz River, which is the Mayfield Dam, and is presently proceeding, and except as restrained by this court, will continue to proceed with its construction until completed. A coffer dam for the Mayfield Power House site, to be constructed as soon as weather permits, will extend to some extent into the bed of said river along the north bank thereof.

The City further has received bids which it considers favorable, and awarded contracts for various items of equipment in connection with such work.

2. Passage and publication as alleged of Ordinance No. 14386 of the City, passed January 9, 1952, a copy of which is attached to the original complaint herein and marked Exhibit "A", and of Ordinances Nos. 15099 and 15325, [fol. 243] passed August 30, 1954 and May 16, 1955, respectively, copies of which are attached to the amended complaint herein and marked Exhibits "F" and "G", respectively.

3. Issuance and acceptance by the City of Federal Power Commission Order dated March 8, 1949, relating to federal jurisdiction, Federal Power Commission Opinion and License issued November 28, 1951, including the City's acceptance thereof, Federal Power Commission Order dated January 24, 1952, denying a rehearing on such order, opinion and license, copies of which are attached to the original complaint herein and marked Exhibits "C", "D" and "E", respectively, and Federal Power Commission Order dated February 24, 1954, amending such license, a copy of which is attached to the amended complaint herein and marked Exhibit "H".

4. The carrying out of the City's project will necessarily take and damage lands and property owned by the State, which the City has not as yet acquired or initiated proceedings to acquire, to wit:

(a) beds of the Cowlitz River, a meandered stream;

(b) approximately 34.5 miles of shorelands of said river located in Township 12 North, Ranges 2, 3, 4 and 5 East, and Township 11 North, Ranges 4 and 5 East, W.M., in Lewis County;

(c) approximately 148.39 acres of school and granted lands located in Township 12 North, Ranges 3 and 4 East, W.M., in Lewis County;

(d) approximately 27.99 acres of forest board lands acquired in 1942 located in Section 28, Township 12 North, Range 2 East, W.M., in Lewis County;

(e) approximately 20.5 miles of primary highway No. 5 and No. 5L located in Township 12 North, Ranges 2, 3, 4 [fol. 244] and 5 East, and Township 11, Ranges 4 and 5 East, W.M., in Lewis County.

5. The carrying out of the City's project, upon completion of the Mayfield Dam (which the City estimates to be about two years), and the closing of the gates thereof to fill the reservoir created thereby, will inundate a large portion of a State Fish Hatchery site held for Game Department purposes, flooding 61.63 acres located in Section 11, Township 12 North, Range 2 East, W.M., in Lewis County, adjacent to the Cowlitz River, used for the propagation, rearing and conservation of game fish. Included in the portion so inundated will be all the fishponds and buildings of such hatchery.

6. The State Department of Fisheries owns a fish hatchery for the trapping, propagation and conserving of food fish, located in Section 29, Township 14 North, Range 10 East, W.M., in Lewis County, at the junction of the Ohanapecosh River and Clear Fork Creek, which empty into the Cowlitz River, which location is above the proposed Mossyrock reservoir and will not be inundated thereby.

The site of this hatchery was acquired by federal use permit from the United States Department of Agriculture Forestry Service in 1926, and subsequently such hatchery utilized as a trapping station for taking eggs from upstream migrants for rearing in such and other hatcheries. It was so operated until December, 1949. During the summers of 1950, 1951 and 1952 eggs were taken thereat. Thereafter use of such hatchery was placed in abeyance. The Department of Fisheries says that it has not abandoned such station, but intends to utilize it for egg taking in connection with the new hatchery on Hall Creek mentioned in the next paragraph.

[fol. 245] 7. The State Department of Fisheries owns a partially completed fish hatchery intended for the propagation and conserving of food fish, comprising approxi-

mately 8 acres costing approximately $6,000.00 and upon which approximately $100,000 has been expended, located in Sections 32 and 33, Township 13 North, Range 9 East, W.M., in Lewis County, at the junction of Johnson and Hall Creeks, which empty into the Cowlitz River, which location is above the Mossyrock reservoir and will not be inundated thereby.

The site of this hatchery was purchased by the Department in September, 1950, and thereafter approximately $100,000 in federal funds expended toward development thereof, out of a total allocation of $340,000 made therefor. Work thereon was stopped in December, 1951, and by telegram dated November 29, 1951, the Department was directed by the U.S. Fish and Wild Life Service to incur no further expense thereon pending the outcome of litigation concerning the City's proposed project, and work thereon has since been held in abeyance.

8. The Defendants Directors and State, if permitted to do so over plaintiff's objection as to the materiality thereof in this proceeding and under the law of this case, would produce two expert witnesses who would testify that in their opinion probable damage to some upstream and downstream migrating fish will result during and from the construction of the City's project, and such testimony may be deemed given without the necessity of producing such witnesses, if same is held admissible by the Court.

9. The City's proposed dams, when constructed, will extend entirely across the Cowlitz River at the two dam [fol. 246] sites, and will be structures with no lock for passage of water craft.

The evidence as to the extent and nature of use of the river at the two dam sites is as follows:

Many years ago some logs and shingle bolts were floated down the river to market.

Some Indian or Indians would testify that many years ago Indians poled canoes up and down the river and sometimes carried berries and furs down river.

Fishermen and other recreationists occasionally pass the site in rowboats.

The Fisheries Department occasionally has patrolled the river in a small outboard motorboat.

10. The City has not as yet obtained the right from the Director of Highways under the provisions of R.C.W. 90.28.010 to perpetually back and hold the waters of the Cowlitz River above said dams and to overflow and inundate state and county highways thereby, but has submitted maps and plans relating to such overflowing and inundations to said director and has made available to the Director of Highways the sum of $71,000 for surveys and estimate of costs of relocating such highways, and said Department for several months has been engaged in making such surveys and estimates.

11. The City has not as yet obtained approval of plans and specifications for said Mayfield dam as to its safety from the Supervisor of Water Resources under the provisions of R.C.W. 90.28.060, but has submitted plans and specifications therefor to such supervisor for review.

12. The City in accordance with the provisions of said Ordinance No. 14386 as amended has used and proposes to continue to use surplus funds of its light utility as available [fol. 247] to pay the costs of such project, and to issue and sell revenue bonds of said utility therefor.

The City has made no transfer or use of city funds except as provided in said ordinance as amended.

The City states that the issuance and sale of such revenue bonds is necessary in order to enable it to obtain the necessary funds to acquire the lands and property aforesaid of the State and of others, and to pay the costs of relocation of said highways and other costs of survey, engineering and planning in connection therewith.

13. The parties in agreeing to the above matters do not waive legal positions heretofore taken, nor agree to the competency or materiality thereof, nor acquiesce in the declarations or positions of opposing parties, nor do they restrict themselves from presenting evidence supplemental thereto at the trial, but shall inform other parties of the

nature of such evidence at least by noon, Friday, December 30, 1955.

E. K. Murray, Special Counsel, Clarence M. Boyle, City Attorney, Marshall McCormick, Chief Asst. City Attorney, Frank L. Bannon, Chief Asst. City Attorney, Attorneys for Plaintiff.

s/ Don Eastvold, Attorney General, s/ Joseph J. Mijich, Asst. Atty. Gen., s/ E. P. Donnelly, Asst. Atty. Gen., Attorneys for Defendant Directors.

[fol. 248] s/ Lynch and Lynch, Attorneys for Defendant Taxpayers.

The foregoing pretrial stipulation of the parties is hereby approved.

Dated at Olympia, Washington, December 30, 1955.

/s/ Charles T. Wright, Judge.

[File endorsement omitted]

[fol. 249] In the Superior Court of the State of Washington

Letter From Judge Charles Wright to E. K. Murray

Charles T. Wright
Judge of the Superior Court
Olympia, Washington

January 5, 1956

Mr. E. K. Murray,
Attorney at Law,
1012 Rust Building,
Tacoma, 2, Washington.

Re: City of Tacoma vs. Taxpayers et al.

Dear Mr. Murray:

The case of City of Tacoma vs. Taxpayers et al. has been re-set for Wednesday, January 11, 1956 for one day. The court hopes this matter can be completed in one day.

After reading briefs the Court feels that testimony can be limited to the question of navigation. Also since talking to you by telephone the Court has been informed by Mr. Donnelly that in addition to the question of navigation he plans to offer to prove by the Director of Water Resources, Mr. Murray Walker, that no application for a permit has been made to his office. That item of evidence has not been considered, and, therefore, the Court is not prepared at this time to pass upon its admissibility. Regardless of what is done on that question that issue should not extend the trial more than a few minutes.

Upon the question of damage to fish the Court is of the opinion that the decision of the Federal Power Commission and the decision of the Supreme Court of this state are controlling.

Upon the question of relocation of the fish hatchery, the Court is of the opinion that only a question of law is presented. The question of law will relate to the extent of the powers of condemnation given to plaintiff under the license from the Federal Power Commission. The only possible evidence that could be received on that question would be a copy of the license if no copy is now in the file. That is probably unnecessary as the Court understands that the defendants do not question that the plaintiff has such a license.

[fol. 250] A copy of this letter is being sent to Mr. Donnelly. It will be for you and Mr. Donnelly to each notify all co-counsel of this letter.

Respectfully yours,

/s/ Charles T. Wright
Charles T. Wright

[File endorsement omitted]

[fol. 282] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

MOTION FOR STAY PENDING APPEAL—Filed January 26, 1956

Comes now plaintiff, City of Tacoma, and moves that any judgment entered herein pursuant to the Court's oral decision rendered January 13, 1956, be stayed pending prompt appeal by plaintiff to the Supreme Court from such judgment and diligent prosecution and disposal thereof.

As a less desired alternate to the above, plaintiff moves that the effective date of any such judgment be postponed, or the same be temporarily stayed, for such reasonable time as will permit plaintiff to promptly appeal from such judgment and to promptly make application to and obtain action by the Supreme Court on an application to it to stay such judgment pending disposal by such Court of such appeal.

It is further moved that if any bond is required in connection with the above, the amount thereof be fixed.

This motion is based upon the files herein and the affidavits of Henry A. Cole, Dean Barline, L. E. Dixon and E. K. Murray herewith filed, and the showing therein made that great and irreparable damage will result to plaintiff if such stay is not granted, and that in the absence thereof plaintiff will be denied the fruits of suc-
[fol. 283] cess upon appeal, and that the status quo as it existed at the end of August, 1955, when defendants changed their positions and first made claim of interference with navigation herein, will be best preserved, and the best interests of the taxpayers of the City as well as its light utility will be best served by such stay.

Dated at Tacoma, Washington, January 26, 1956.

E. K. Murray, Special Counsel, Clarence M. Boyle, City Attorney, Marshall McCormack, Chief Asst. City Attorney, Frank L. Bannon, Chief Asst. City Attorney, Attorneys for Plaintiff.

Proof of service (omitted in printing).

[File endorsement omitted]

[fol. 284] AFFIDAVIT OF HENRY A. COLE

State of Washington,
County of Pierce, ss.

Henry A. Cole, being first duly sworn, on oath, deposes and says:

I am a licensed professional engineer and since March, 1954, have been Superintendent of Light of the City of Tacoma, in charge of operation of its light utility, and Chief Engineer in charge of the development of its Cowlitz Power Project. Prior to my appointment as Superintendent of Light I was Project Engineer on such project, and prior thereto Project Engineer on the City's Nisqually Project.

My work has included the preparation of plans and specifications, the making of engineer's estimates, the participation in conferences and hearings, the evaluation of contracts, the making of progress reports and estimates, the recruiting of personnel, the procuring of materials and supplies, and generally, dealing with all phases of development and construction, and has extended over the whole period of such project since its inception.

During the past fifteen months, following the decision of the Washington Supreme Court in this cause, and the [fol. 285] denial of certiorari by the U. S. Supreme Court in *Depts of Fisheries and Game* v. *Federal Power Commission*, 207 Fed. (2d) 391, and advice by New York bond attorneys that they would approve the validity of the City's proposed bond issue for construction of the project, work thereon has been greatly intensified, a construction organization built up, field work undertaken, plans and specifications prepared, bids called for, contracts let, and construction work commenced and is now being carried on.

In connection with such development, and as part of the process of obtaining a license from the Federal Power Commission therefor, plans and specifications covering such project were submitted to the Secretary of War and the Chief of Engineers of the United States, and were approved by them pursuant to Section 4(e) of the Federal Power Act, insofar as the interests of navigation and

Item	Contractor	Engineer's Estimates	Contract Price
General Construction of Mayfield Dam	Arundel Corp. L. E. Dixon	$16,555,450	$10,863,140
Turbines	S. Morgan Smith Co.	$ 2,600,000	$ 1,701,870
Transformers	Pacific Oerlikon Co.	$ 1,226,550	$ 629,400
Circuit Breakers	Kelman Mfg. Co.	$ 450,000	$ 283,280
Bridge Crane	Moffett Eng. Co.	$ 150,000	$ 95,400
Generators	Allis-Chalmers Co.	$ 3,600,000	$ 2,547,780
	Totals	$24,582,000	$16,120,870

flood control were concerned, and after inclusion of certain suggested provisions in the license to improve navigation both above and below the proposed dams and greatly contributing to flood control. No locks for ship passage thru the dams were required because no existing navigation at the sites of the dams was found to exist, but the right of the United States to install such locks was reserved, and the City required to provide rights of way therefor and to furnish power for operation thereof without charge.

The small motor boat now occasionally used by the State Departments of Fisheries is one made available to it by the City for fish research studies in connection with the present project. The City was without notice of claim by anyone of interference with navigation until the last four months, and does not believe than (sic) any such interference exists.

The construction organization which the City has built [fol. 286] up over the period of the last year and a half in connection with said project now consists of approximately 112 persons. Most of these are non-civil service employees engaged only for the duration of the present project, and a large number thereof are professional engineers specially experienced and selected for particular phases of engineering and construction work and recruited at considerable expense to come to Tacoma from all parts of the United States for this particular work.

It is generally known that it takes a period of from three to six months for an engineering staff or section to become oriented to the particular and peculiar problems of each construction project, and in the event the City is enjoined from making any payment to these employees pending appeal herein, such employees will be lost and such organization destroyed, and it will take at least a year to recruit and re-establish a new organization with anywhere near the present skill and efficiency. In one or two instances it may well be impossible to replace certain chief or head engineers.

Further, by such an interruption, all studies and planning and research work now being carried on, including that by the State Highway Department for relocation of highways, and that by the State Fisheries and Game De-

partments for protection of fish, and studies and research by the University of Washington and University of Minnesota covering hydraulic and other problems, for all of which the City is paying, will be stopped.

The individual employees of the City, as well as those of its contractors, will also suffer by any stoppage of work. Many of these employees have moved their families to the City or site of the work, and assumed contractural (sic) obligations for purchase of homes or other facilities, which [fol. 287] can only be disposed of at considerable loss.

In addition to the foregoing, the City prior to the enlarging of the issues in this cause and the raising of the claim of interference with navigation, had called for bids and awarded contracts covering various portions of its Mayfield plant. These contracts were let for considerably less than the engineer's estimates for such work, and were and are of great value to the City. These contracts, the contractors, the engineer's estimates, and the contract prices are as follows:

Item	Contractor	Engineer's Estimates	Contract Price
General Construction of Mayfield Dam	Arundel Corp. L. E. Dixon	$16,555,450	$10,863,140
Turbines	S. Morgan Smith Co.	$ 2,600,000	$ 1,701,870
Transformers	Pacific Oerlikon Co.	$ 1,226,550	$ 629,400
Circuit Breakers	Kelman Mfg. Co.	$ 450,000	$ 283,280
Bridge Crane	Moffett Eng. Co.	$ 150,000	$ 95,400
Generators	Allis-Chalmers Co.	$ 3,600,000	$ 2,547,780
	Totals	$24,582,000	$16,120,870

Said general contractor has approximately 185 employees, and extensive equipment on hand at site for use in connection with his work, all of which he would necessarily move elsewhere for use in case of suspension of work pending appeal.

The City has already suffered considerable damage from delay of the work by reason of the restraining order entered herein June 24, 1955.

To suspend the work entirely pending appeal herein and to forthwith bar any further expenditure in connection with [fol. 288] such project, would not only destroy and in-

convenience the City's construction organization as above set forth, but would subject the City to contract termination charges and claims estimated at in excess of $1,300,000.00.

Further, in the event of termination of the foregoing contracts, and subsequent reversal of this court's decision holding interference with navigation, it would become necessary for the City to re-advertise for bids for the work covered by all such contracts, and labor and material prices, particularly steel and cement, have increased considerable since the letting of such contracts in June of last year, and it is certain that any new contracts would be at a greatly increased price, perhaps amounting to several million dollars.

In addition to the above, a year's delay in completion of the City's project, which would be likely if the same is now interrupted and it becomes necessary to start over again, would result in loss of one year's revenue, estimated at a minimum of approximately three million dollars, now being spent for outside purchase of power.

The court's decision as rendered on the point of interference with navigation, would affect the authority of any city or town in the State to build any dam on any navigable stream in the State, regardless of how scant or ancient navigation might be. It is therefor important not only to Tacoma but others that such decision be promptly reviewed and it is the City's intention to so do and to diligently prosecute its appeal.

Further, under the court's decision, only the authority of a city or town to construct such a project would be effected, leaving private utilities or individuals or Public [fol. 289] Utility Districts free to act under a federal license. Under these circumstances and in view of the great continuing demand for power in the Pacific Northwest, present Bonneville Power Administration estimates include the bringing in of Mayfield in 1958, but still leave a great potential need, in my opinion any additional expenditures which the City would make by continuing work on the project pending appeal could be ultimately recouped if necessary by disposal of the City's rights under its contracts and federal license to others.

On the other hand, if the City is now compelled effective immediately to discharge its entire construction organization and to terminate all contracts, and to refrain from any further expenditures whatever in the development of its project, and it is successful upon appeal, it will have suffered great and irreparable damage with no one to look to for reimbursement.

The doubtful nature of the point involved, which was apparently an after thought of defendants, and followed a recent reversal of position on their part, and the comparative costs and inconvenience involved, which in any instance will fall upon the City, in my opinion make it for the public good and in the public interest that work be permitted to continue on the project pending prompt appeal herein and diligent prosecution thereof.

This affidavit is made in support of plaintiff's application for a stay or supersedeas of any judgment or injunction that may be entered herein pursuant to the court's oral decision on January 13, 1956.

Henry A. Cole

[fol. 290] Subscribed and sworn to before me this 24th day of January, 1956.

Robert R. Hamilton, Notary Public in and for the State of Washington, residing at Tacoma.

[fol. 291] AFFIDAVIT OF DEAN BARLINE

State of Washington,
County of Pierce, ss.

Dean Barline, being first duly sworn, on oath, deposes and says:

I am and have been since March 1954 Director of Utilities of the City of Tacoma, which includes the Light and Power, Water and Belt Line utilities of the City. Prior to appointment to such position, I was Assistant City Attorney for the City, assigned to all matters affecting said utilities.

I have read the affidavits of E. K. Murray and Henry A. Cole, filed herein, and am familiar with the matters therein set forth, and fully agree therewith.

The cost and inconvenience which would result to the City through any stoppage of work on the City's Cowlitz project pending appeal herein, would far exceed any loss which would result from continuation of such work pending appeal even if the City was ultimately unsuccessful on such appeal, and in my opinion, the public good and the public interest will best be served by granting a stay or supersedeas of any judgment entered herein pending appeal.

[fol. 292] I am definitely of the opinion that should it become necessary Tacoma can fully recoup any investment it has made or may make in said project pending appeal herein, by disposal of its rights in said project and the work done thereon to others, so that the City will suffer no loss by continuing work on said project pending appeal.

This affidavit is made in support of plaintiff's motion for such a stay or supersedeas.

Dean Barline

Subscribed and sworn to before me this 23 day of January, 1956.

Robert R. Hamilton, Notary Public in and for the State of Washington, residing at Tacoma.

[fol. 293] AFFIDAVIT OF L. E. DIXON

State of Washington,
County of Pierce, ss.

L. E. Dixon, being first duly sworn, on oath deposes and says:

I am a Vice President of Arundel Corporation and the President of L. E. Dixon Company, general contractors for construction of the City of Tacoma's Mayfield dam, and am in active charge of construction of such project

for such companies, and am familiar with the work relating thereto.

The estimates upon which bids were submitted by our companies to the City pursuant to its call for bids first published April 20, 1955, were based upon labor costs and material prices and time schedules well attainable in the absence of the subsequent restraining orders issued by the Court.

Such restraining orders have resulted in considerable delay in the performance of our contract, and have and will add materially to the cost thereof to the City.

The complete suspension at this time of further work pending appeal herein, which I am informed might take six [fol. 294] months, or more, for disposal, would completely disrupt our revised time schedules and destroy cost bases, and require either termination charges in excess of $1,000,000.00, and complete renegotiation of the contract if the work was later resumed, or the allowance by the City of claims for additional costs resulting from disruption of our construction schedule and attendant delays in substantially the aforesaid amount and renegotiation of the contract prices for later continuance of the work.

Either such alternative will substantially increase the cost to the City, the amount of such increase being presently incapable of exact determination. In the first alternative, in addition to the termination charges, renegotiation of the contract will involve, and, in the second alternative, the contractor's claims will include increased labor and material costs, overhead and plant and equipment charges for the period of delay and the extended period required for performance, which, because of seasonable and river conditions, will probably extend over more than an additional year's time.

Our companies now have on this job a construction organization of approximately 135 men, and our sub-contractors of approximately 50 men. The key personnel within these organizations, with their accumulated on the job experience, would either have to be carried idle at an expense of over $35,000.00 per month during the period of appeal, or would immediately disintegrate upon cessation of the work, and it would be exceedingly difficult, if not impossible, to thereafter re-assemble the same.

Our companies now have approximately $700,000.00 plant investment on the job, and equipment having a value of approximately $1,000,000.00 standing by on site for use, all of which would be idled by any cessation of work.

[fol. 295] In my opinion any such interruption or cessation of work pending disposal of appeal herein, even if it required only four or five months, would result in an additional year's delay in addition to delays and disruptions already suffered by reason of previous orders of this Court, in the ultimate completion day of the work, and cause irreparable damage to the City.

This affidavit is made in support of the City's motion for a stay of judgment herein, but nothing herein contained shall in any manner circumscribe, limit or affect the contractors' rights or claims, either as to amount, character, or otherwise.

L. E. Dixon

Subscribed and sworn to before me this 24th day of January, 1956.

(Seal of Notary)

Robert W. Reynolds, Notary Public in and for the State of Washington, residing at Tacoma.

[fol. 296] AFFIDAVIT OF E. K. MURRAY

State of Washington,
County of Pierce, ss.

E. K. Murray, being first duly sworn, on oath deposes and says:

I am an attorney admitted to practice before Courts, Commissions and Departments of the United States and the State of Washington, and have been associated as Special Counsel for the City of Tacoma in various proceedings pertaining to its proposed Cowlitz Project since December, 1948, and am generally familiar with such proceedings.

Said proceedings have required appearances of City officials before the State Department of Conservation and Development, Supervisor of Water Resources (including a public hearing held thereby), the State Legislature (including a public hearing held thereby), the Federal Power Commission (including a public hearing held thereby at which nearly 150 representatives of numerous organizations throughout the State appeared and testified), the Secretary of War, the Chief of Engineers of the United States, the Secretary of the Interior, the United States Fish and Wild- [fol. 297] life Service, and the State Departments of Fisheries and Game.

Not once before any of said bodies to my recollection did anyone ever make objection or claim that such project would in any way interfere with public or other navigation on said river.

That the determination of the Secretary of War and Chief of Engineers in their Section 4 (e) Report submitted to the Federal Power Commission pursuant to the Federal Power Act was that said project would aid and benefit and improve navigation on said river, and approval of said project in the interests of navigation and flood control was given pursuant to the letters of the Chief of Engineers dated 26 January 1950 and 29 December 1951, copies of which are hereunto attached, marked Exhibits "A" and "B", respectively, and made a part hereof.

That after an extended formal hearing in which the defendants Directors of Fisheries and Game appeared as objectors, the Federal Power Commission entered its findings and order and issued its license covering said project to the City, copies of which order, findings and license are attached to the original Complaint herein and marked Exhibits "C", "D" and "E" to such complaint and by reference are made a part hereof. That said findings and order and the articles contained in said Commission's form L-6 introduced upon the trial herein as Plaintiff's Exhibit 5 deal extensively with navigation and make detailed and extensive provisions in the interests and for the protection and benefit thereof on the Cowlitz River. That particular attention is directed to Findings Nos. 1, 4, 5, 6, 7, 8, 32, 34, 53,

59 and 65 as contained in the forepart of said order and to paragraphs A and B of said order, and Article 35a of said order, and to Articles 2, 7, 9, 15, 16, 17 and 18 of said general license terms contained in said form L-6.

[fol. 298] That the issues which were presented to this Court, and to the Supreme Court on prior appeal herein, by plaintiff's complaint and the defendant Directors' amended cross-complaint and the demurrers thereto, were made up after conference between counsel for all parties, and contained all questions which any of the parties desired to raise herein concerning the subject matter of this suit.

That any claim of lack of authority on the City's part under R.C.W. 80.40.010 et seq. to construct the dams included in such project because of any claimed interference with navigation on the Cowlitz River could have been raised by defendants at that time had they wished or elected so to do.

That following the decision of the Supreme Court in this cause in *Tacoma v. Taxpayers,* 43 Wn. (2d) 468, this Court, pursuant to the remittitur of said Court, overruled defendants taxpayers' demurrer to plaintiff's complaint and sustained plaintiff's demurrer to defendant Directors' cross complaint.

Thereafter said taxpayers in April, 1954, filed herein their answer and cross complaint, wherein they claimed and alleged, among other things, "that the Cowlitz River in Lewis County at River Mile 65, known as the Mossyrock site, and at River Mile 52, known as the Mayfield site, is non-navigable".

That the position of said defendants that said river was non-navigable at the sites of said dams continued as above until service of the defendant taxpayer McKee's answer and affirmative defense in November, 1955, in which interference with public navigation was then first claimed and alleged.

That the defendant Directors also in April, 1954, filed [fol. 299] herein their second amended answer and cross complaint wherein they stated and alleged, among other things, "that the Cowlitz River in Lewis County, Washington, at River Mile 65, known as the Mossyrock site, and

at River Mile 52, known as the Mayfield site, is non-navigable".

That the position of said defendants that said river was non-navigable at the site of said dams continued as above until service of said defendants' further answer and cross complaint (their fourth such pleading herein) verified August 26, 1955, in which they claimed and alleged that plaintiff's proposed project would "interfere with public navigation on the Cowlitz River which the City is prohibited from doing under the provisions of R.C.W. 80.40. 010".

That by order entered herein August 8, 1955, the Washington State Sportsmen's Council, Inc., was permitted to intervene herein, and on August 26, 1955, filed a complaint in intervention wherein said Council alleged that many of its members fished in the Cowlitz River and "that the Cowlitz River at the dam sites is non-navigable".

That by order entered herein September 19, 1955, the Columbia River Tuna and Salmon Packers Association was permitted to intervene herein, and on said day filed its complaint in intervention herein wherein it likewise alleged "that the Cowlitz River at the dam sites proposed is non-navigable".

That pursuant to orders entered herein by this Court on November 23, 1955, the complaints in intervention of both said interveners were stricken.

That by order entered herein December 12, 1955, the Columbia River Packers Association, Inc., Mt. Adams Packing Company, Chinook Packing Company and Union Fishermen's Cooperative Packing Company were granted [fol. 300] permission to intervene herein and, pursuant thereto, filed a complaint in intervention verified December 1, 1955, wherein they claimed and alleged "that the Cowlitz River at the dam sites proposed is not navigable". That said complaint in intervention was by order of this Court entered herein on December 12, 1955, stricken.

That so far as I am advised the position of none of such interveners has changed upon the question of navigation.

That plaintiff, while admitting navigability of the lower portion of the Cowlitz River as found by the Federal Power Commission and that its project would affect navigation

and interstate commerce, denied that the same would interfere with navigation in any way, but would constitute an aid and improvement thereto.

Pursuant to pretrial conferences between counsel for the parties herein it was agreed (paragraph 9, Pretrial Order) concerning use of the river at the two dam sites as follows:

> "The evidence as to the extent and nature of use of the river at the two dam sites is as follows:
>
> "Many years ago some logs and shingle bolts were floated down the river to market.
>
> "Some Indian or Indians would testify that many years ago Indians poled canoes up and down the river and sometimes carried berries and furs down river.
>
> "Fishermen and other recreationists occasionally pass the site in rowboats.
>
> "The Fisheries Department occasionally has patroled the river in a small outboard motorboat."

The evidence supplemental to the above offered at the trial narrowed, rather than extended, the above, and clearly showed that there was no present or prospective navigation on the river to interfere with.

Although other points were raised by defendants, the [fol. 301] Court's decision is based solely upon claimed interference with navigation by the project, and the Court's holding based thereon of lack of authority by the City under the proviso contained in R.C.W. 80.40.101 to construct the project.

This is a point which, if sustained, would place cities and towns in Washington in a disadvantageous position when compared to Public Utility Districts and private utility corporations and individuals.

It will be plaintiff's position on appeal herein:

(1) that the above holding is contrary to the law of this case as established on prior appeal herein;

(2) that the matter of what facilities, if any, are to be provided in the interest of navigation are for determination by the Federal authorities and that they have made such a determination in the License issued to plaintiff herein;

(3) that there was wholly insufficient evidence that the Cowlitz River was or is navigable at the dam sites;

(4) that there was no proof at all of any present navigation, or of interference with navigation, present or prospective; and

(5) that, rather, the project will aid and improve navigation as found by the Federal Power Commission, instead of interfere therewith.

I have read the affidavit of Henry A. Cole and of J. D. Barline as to the extent of damage which will result to the City by any enforced stoppage of work at this time, and the comparison therewith of the result which could be experienced if the work is continued pending appeal and the City is unsuccessful thereon, and am of the opinion that the status quo as it existed at the time the question of interference with navigation was first raised herein, and the best interests of the City and its taxpayers, and of all [fol. 302] others who as contractors or employees or otherwise are interested in such project (and who would be adversely affected without an opportunity for hearing), will be best served by the granting of a stay or supersedeas of any judgment or injunction entered herein pending disposal of appeal herein, which will be promptly taken and diligently prosecuted.

This affidavit is made in support of plaintiff's motion for such a stay or supersedeas.

E. K. Murray

Subscribed and sworn to before me this 20th day of January, 1956.

E. M. Murray, Notary Public in and for the State of Washington, residing at Tacoma.

Proof of service (omitted in printing).

[File endorsement omitted]

[fol. 303] EXHIBIT "A" TO AFFIDAVIT OF E. K. MURRAY

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON

In reply refer to
ENGWE

26 January 1950

Chairman
Federal Power Commission
Washington 25, D. C.

Dear Mr. Chairman:

Reference is made to your letter of 15 July 1949, transmitting the application of the City of Tacoma, Washington, for a license for a proposed water power project (No. 2016), which would be located on the Cowlitz River, in Lewis County, Washington.

The Commission has found that "the construction of either or both of the proposed reservoirs would materially affect the navigable capacity of the Cowlitz River," and that "the interests of interstate or foreign commerce would be affected by the construction and operation of either or both of the reservoirs proposed by the declarant." The Commission requests this office to state whether the plans of the structures affecting navigation are satisfactory, and to recommend for insertion in the license the terms and conditions deemed necessary in the interest of navigation.

The possibilities for multiple-purpose development of the Cowlitz River were considered and reported upon by the Division Engineer in a Review Report on the Columbia River and Tributaries, dated 1 October 1948. A total of nine sites in the Cowlitz basin were found to have possibilities for ultimate development. The two most favorable projects were those at the Mayfield and Mossyrock sites, which are involved in application of the City of Tacoma. No recommendation was made in the Review Report for development of Cowlitz River sites by the Federal Government because of the interest of local agencies in undertaking such development and because of the need for correlation

of such development by local interests with the needs for preservation of fishery resources. The Review Report also contains information on the Lower Columbia River Fisheries Plan of the U. S. Fish and Wildlife Service, which was coordinated with the plans for development recommended by the Corps of Engineers for the entire Columbia basin.

If the application of the City of Tacoma for a license is granted, consideration should be given to terms and conditions with respect to navigation, flood control and stream flow regulation aspects as outlined in the following paragraphs.

[fol. 304] Water traffic on the Cowlitz River is presently confined largely to the lower six or seven miles of its length and is limited principally to the movement of log rafts and the barging of gravel. Mayfield Dam, the lower of the two projects involved in the application, would be located at river mile 52, approximately 18 miles above the head of navigation officially established at mile 34, in the vicinity of Toledo, Washington. In regard to the effect of the operation of the proposed Mayfield plant on navigation, it is recommended that the following terms and conditions be inserted in the license if granted:

a. "The minimum release of water at the Mayfield plant shall be 2000 c.f.s."

b. "The rate of change of release of water from the Mayfield plant shall not exceed that which will cause a change of water level at the City of Castle Rock, Washington, of one foot per hour, either up or down."

The proposed plans of the structures affecting navigation are satisfactory to this office insofar as approval in accordance with the provisions of Section 4(e) of the Federal Power Act is concerned.

The needs for flood control can be satisfactorily provided for insofar as these proposed developments are concerned, if the following terms are included in any license granted:

"During the months October through May flood storage space reservation in Mossyrock Reservoir corre-

sponding to reservoir level elevation 750, full reservoir, on 1 October, decreasing uniformly to elevation 723 on 1 December, remaining constant at elevation 723 from 1 December to 1 February, increasing uniformly from elevation 723 on 1 February to elevation 745 on 1 May and reaching elevation 750 no sooner than 1 June, shall be kept available for the temporary storage of flood water. During floods the gates shall be operated, in conjunction with the operation of the Mayfield Reservoir, so as not to exceed a flow of 70,000 c.f.s. (bank full capacity) at Castle Rock, Washington, until the reservoir storage, if exceeding the specified reservation, has been decreased to the specified reservation."

In addition, provision should be made in any license for coordination of operation of the proposed work with any of the several additional possible projects on the Cowlitz River which may be developed in the future.

[fol. 305] One copy of the application for license was returned to the Chief, Licensed Projects Division, Federal Power Commission, on 7 October 1949.

Sincerely yours,

/s/ Lewis A. Pick
LEWIS A. PICK
Major General
Chief of Engineers

[fol. 306] EXHIBIT "B" TO AFFIDAVIT OF E. K. MURRAY

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON

In reply refer to ENGWE

29 December 1951

Chairman, Federal Power Commission,
Washington 25, D. C.

Dear Mr. Chairman:

Reference is made to the Commission's letter of 10 December 1951, which requested approval of the inclosed

eleven tracings for the City of Tacoma's proposed development (No. 2016), located on the Cowlitz River, Washington.

In accordance with Section 4(e) of the Federal Power Act, the eleven tracings are returned herewith approved insofar as the interests of navigation are concerned, and five of the tracings (FPC Nos. 2016-2, 4, 6, 17 and 18) have been signed.

Sincerely,

/s/ E. C. Paules,
Lt. Colonel, Corps of Engineers,
Deputy Chief of Civil Works for Power.

1 Incl: Eleven tracings FPC Nos. 2016-1, 2, 4, 5, 6, 7, 8, 13, 14, 17 and 18.

Federal Power Commission: Docketed Jan. 2, 1952.

[fol. 307] [File endorsement omitted]

In the Superior Court of the State of Washington, for Thurston County

[Title omitted]

Notice of Hearing on Motion for Stay Pending Appeal—Filed January 26, 1956

To: The Taxpayers of Tacoma, Washington, Defendants, and Lynch and Lynch, their attorneys, and Robert Schoettler, as Director of Fisheries, and John A. Biggs, as Director of Game, of the State of Washington, and The State of Washington, a sovereign State, Defendants, and Don Eastvold, Attorney General, and Joseph T. Mijich and E. P. Donnelly, Assistant Attorneys General, their attorneys:

Please Take Notice that on Monday, January 30, 1956, at 1:30 P. M., or as soon thereafter as counsel may be heard, at the courtroom of the Hon. Charles T. Wright, Judge of the above entitled Court, at the Courthouse in

Olympia, Washington, the City of Tacoma, plaintiff above named, will present its motion for stay pending appeal of any judgment entered herein pursuant to the Court's oral decision rendered January 13, 1956.

A copy of said motion and the affidavits in support thereof are herewith served upon you.

Dated at Tacoma, Washington, January 26, 1956.

Clarence M. Boyle, City Attorney, E. K. Murray, Special Counsel, Marshall McCormick, Chief Asst. City Attorney, Frank L. Bannon, Chief Asst. City Attorney, Attorneys for Plaintiff.

Proof of service (omitted in printing).

[fol. 310] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
Filed February 27, 1956

This matter coming on regularly for trial, without a jury, on the 11th day of January, 1956, on plaintiff's amended complaint, the amended answer and cross-complaint of defendants, State of Washington, Robert Schoettler, director of fisheries, and John A. Biggs, director of game, and the answer and affirmative defense of E. R. McKee, representative taxpayer; plaintiff appearing by E. K. Murray, special counsel, and Frank L. Bannon, chief assistant city attorney; defendants, State of Washington, Robert Schoettler, director of fisheries, and John A. Biggs, director of game, appearing by Don Eastvold, attorney general, Joseph T. Mijich and E. P. Donnelly, assistant attorneys general; and E. R. McKee, defendant taxpayer, appearing by John S. Lynch; and a pretrial conference stipulation having heretofore been entered herein, and certain admissions in the pleadings having heretofore been made, and evidence, both oral and documentary, having been introduced at the trial, and the cause submitted for decision, the court now makes its findings of fact as follows:

Findings of Fact

I.

That the State of Washington is a sovereign state of the United States of America. That plaintiff, City of Tacoma, a municipal corporation, is a political subdivision of the [fol. 311] State of Washington, and that E. R. McKee is a citizen and representative taxpayer of the City of Tacoma.

II.

That the City of Tacoma entered into a construction contract on June 23, 1955, to build the first of two dams on the Cowlitz River, which is the Mayfield dam, and has been proceeding with construction of this project and has signified its intention of continuing with its construction until completed. A coffer dam for the Mayfield power house site, which the plaintiff intended to construct as soon as weather permits, would extend to some extent into the bed of the Cowlitz River along the north bank thereof.

The city further has received bids which it considers favorable, and awarded contracts for various items of equipment in connection with such work.

III.

That on January 9, 1952, the City of Tacoma passed Ordinance No. 14386, a copy of which is attached to plaintiff's original complaint herein and marked Exhibit "A," and thereafter the city passed Amendatory Ordinances thereto Nos. 15099 and 15325, copies of which are attached to plaintiff's amended complaint herein and marked Exhibits "F" and "G," respectively.

IV.

That there has been an issuance and acceptance by the city of Federal power commission order dated March 8, 1949, relating to Federal jurisdiction, Federal power commission opinion and license issued November 28, 1951, including the city's acceptance thereof, Federal power commission order dated January 24, 1952, denying a rehearing

on such order, opinion, and license, copies of which are attached to the original complaint herein and marked Exhibits "C," "D" and "E," respectively, and Federal power commission order dated February 24, 1954, amending such license, a copy of which is attached to the amended complaint herein and marked Exhibit "H."

[fol. 312] V.

That the carrying out of the city's project will necessarily take and damage lands and property owned by the state, which the city has not as yet acquired or initiated proceedings to acquire, to-wit:

(a) beds of the Cowlitz River, a meandered stream;

(b) approximately 34.5 miles of shorelands of said river located in Township 12 North, Ranges 2, 3, 4 and 5 East, and Township 11 North, Ranges 4 and 5 East, W.M., in Lewis County;

(c) approximately 148.39 acres of school and granted lands located in Township 12 North, Ranges 3 and 4 East, W.M., in Lewis County;

(d) approximately 27.99 acres of forest board lands acquired in 1942 located in Section 28, Township 12 North, Range 2 East, W.M., in Lewis County;

(e) approximately 20.5 miles of primary highway No. 5 and No. 5L located in Township 12 North, Ranges 2, 3, 4 and 5 East, and Township 11, Ranges 4 and 5 East, W.M., in Lewis County.

VI.

That the carrying out of the city's project, upon completion of the Mayfield dam (which the city estimates to be about two years), and the closing of the gates thereof to fill the reservoir created thereby, will inundate a large portion of a state fish hatchery site held for game department purposes, flooding 61.63 acres located in Section 11, Township 12 North, Range 2 East, W.M., in Lewis County, adjacent to the Cowlitz River, used for the propagation, rearing and conservation of game fish. Included in the

portion so inundated will be all the fishponds and buildings of such hatchery, all of which are located above high water mark. The state game commission on August 16, 1955, adopted a resolution opposing the city's acquisition of this hatchery, a copy of which resolution is attached to defendants' amended answer and cross-complaint herein and marked Exhibit "I."

[fol. 313] VII.

That the state department of fisheries owns a fish hatchery for the trapping, propagation and conservation of food fish, located in Section 29, Township 14 North, Range 10 East, W.M., in Lewis County, at the junction of the Ohanapocosh River and Clear Fork Creek, which empty into the Cowlitz River, which is located above the proposed Mossyrock reservoir and will not be inundated thereby.

That the site of this hatchery was acquired by Federal use permit from the United States department of agriculture forestry service in 1926, and subsequently such hatchery has been utilized as a trapping station for taking eggs from upstream migrants for rearing in such and other hatcheries. It was so operated until December, 1949. During the summers of 1950, 1951 and 1952 eggs were taken thereat. Thereafter use of such hatchery was placed in abeyance. The department of fisheries has not abandoned such station, but intends to utilize it for egg taking in connection with the new hatchery on Hall Creek mentioned in the next finding of fact.

VIII.

That the state department of fisheries owns a partially completed fish hatchery intended for the propagation and conservation of food fish, comprising approximately 8 acres costing approximately $6,000.00 and upon which approximately $100,000 has been expended, located in Sections 32 and 33, Township 13 North, Range 9 East, W.M., in Lewis County, at the junction of Johnson and Hall Creeks, which empty into the Cowlitz River, which location is above the Mossyrock reservoir and will not be inundated thereby.

The site of this hatchery was purchased by the department in September, 1950, and thereafter approximately $100,000 in Federal funds expended toward development

thereof, out of a total allocation of $340,000 made therefor. By telegram dated November 29, 1951, the department was directed by the United States fish and wild life service to incur no further expense thereon pending the outcome of [fol. 314] litigation concerning the city's proposed project, and work thereon was stopped in December, 1951, and work thereon has since been held in abeyance.

IX.

That the city's proposed dams, when constructed, will extend entirely across the Cowlitz River at the two dam sites and will be structures with no lock for passage of watercraft.

That the evidence as to the extent and nature of use of the river at the two dam sites is as follows:

> Many years ago some logs and shingle bolts were floated down the river to market.
>
> Indians used the river in the early days for the transporting of supplies, in taking furs, dried fish, and other products down the river and trading them for other articles they needed.
>
> Fishermen and other recreationists occasionally pass the sites in rowboats.
>
> The fisheries department occasionally has patrolled the river in a small outboard motorboat.

That the Cowlitz River is meandered from its mouth to a point above the situs of the two dams.

That the Cowlitz River at all points involved in this case has been used and is capable of use for public navigation, and the construction of either dam as proposed by the City of Tacoma will interfere with such public navigation.

X.

That the city has not as yet obtained the right from the director of highways under the provisions of RCW 90.28.010 to perpetually back and hold the waters of the Cowlitz River above said dams and to overflow and inundate state and county highways thereby, but has submitted maps and

plans relating to such overflowing and inundations to said director and has made available to the director of highways the sum of $71,000 for surveys and estimate of costs of relocating such highways, and said department for several months has been engaged in making such surveys and estimates.

[fol. 315]

XI.

That the city has not as yet obtained approval of plans and specifications for said Mayfield dam as to its safety from the supervisor of water resources under the provisions of RCW 90.28.060, but has submitted plans and specifications therefor to such supervisor for review.

XII.

That the city has not obtained a water appropriation permit from the supervisor of water resources under the provisions of RCW 90.20.010, *et seq.*

XIII.

That the city in accordance with the provisions of said Ordinance No. 14386, as amended, has used and proposes to continue to use surplus funds of its light utility as available to pay the costs of such project, and to issue and sell revenue bonds of said utility therefor.

That the city has made no transfer or use of city funds except as provided in said ordinance, as amended.

That the city states that the issuance and sale of such revenue bonds is necessary in order to enable it to obtain the necessary funds to acquire the lands and property aforesaid of the state and of others, and to pay the costs of relocation of said highways and other costs of survey, engineering and planning in connection therewith.

XIV.

That the city has applied to the Federal power commission for amendment of its license with respect to time of completion of the project and other matters, but the Federal power commission has not acted upon this application nor given its approval.

Done in open court this 27th day of February, 1956

/s/ Charles T. Wright, Judge

From the Foregoing Findings of Fact, the Court Now Makes the Following:

[fol. 316] CONCLUSIONS OF LAW

I.

That the court has jurisdiction of the parties and the subject matter of this action.

II.

That the question of damage to fish is not before the court.

III.

That the question of the capacity of the plaintiff to acquire property of the defendant, State of Washington, by eminent domain is a matter which must be determined in the superior court of Lewis County.

IV.

That the Cowlitz River is and has been used, and is capable of being used, for public navigation.

V.

That the power and authority of plaintiff to engage in the business of operating an electric public utility is obtained from the sovereign State of Washington, the statutory provisions for which are included in RCW 80.40.010, *et seq.*, and that the power granted by the state is with the limitation that a city in building a dam may not impede, obstruct, or in any way interfere with public navigation.

VI.

That the construction of the Mayfield and Mossyrock dams will impede, obstruct, or interfere with public navigation on the Cowlitz River.

That the expenditure of any sums of money of the City [fol. 317] of Tacoma relating to the Mayfield and Mossyrock hydroelectric project is illegal.

Done in open court this 27th day of February, 1956.

/s/ Charles T. Wright, Judge.

Presented by:

/s/ Joseph T. Mijich, Assistant Attorney General, Attorney for Defendant Directors and State of Washington.

/s/ John S. Lynch, Attorneys for Defendant Taxpayer.

Copies Received

/s/ E. K. Murray, Special Counsel.

/s/ Frank L. Bannon, Chief Assistant City Attorney, Attorneys for Plaintiff.

[File endorsement omitted]

[fol. 318] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

PLAINTIFF'S EXCEPTIONS TO REFUSAL OF COURT TO MAKE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ENTER JUDGMENT AS PROPOSED BY PLAINTIFF—Filed February 27, 1956

The Findings of Fact and Conclusions of Law and Judgment proposed by plaintiff herein were called to the Court's attention before entry of Findings of Fact, Conclusions of Law and Judgment by the Court, and such Findings of Fact, Conclusions of Law and Judgment proposed by

plaintiff were refused, to which plaintiff excepted and its exceptions are hereby noted and allowed.

Dated at Olympia, Washington, February 27th, 1956.

/s/ Charles T. Wright, Judge.

Presented by:

/s/ E. K. Murray, Of Attorneys for Plaintiff.

[fol. 320] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF THURSTON

[Title omitted]

JUDGMENT—March 6, 1956

This matter coming on regularly for trial, without a jury, on the 11th day of January, 1956, on plaintiff's amended complaint, the amended answer and cross-complaint of defendants, State of Washington, Robert Schoettler, director of fisheries, and John A. Biggs, director of game, and the answer and affirmative defense of E. R. McKee, representative taxpayer; plaintiff appearing by E. K. Murray, special counsel, and Frank L. Bannon, chief assistant city attorney; defendants, State of Washington, Robert Schoettler, director of fisheries, and John A. Biggs, director of game, appearing by Don Eastvold, attorney general, Joseph T. Mijich and E. P. Donnelly, assistant attorneys general; and E. R. McKee, defendant taxpayer, appearing by John S. Lynch; and a pretrial conference stipulation and order having heretofore been entered herein, and certain admissions in the pleadings having heretofore been made, and evidence, both oral and documentary, having been introduced at the trial and the cause submitted for decision, and the court having heretofore entered its findings of fact and conclusions of law; now, therefore,

It Is Hereby Ordered, Adjudged and Decreed that the question of the capacity of the plaintiff to acquire prop-

erty of the defendant, State of Washington, by eminent [fol. 321] domain is not within the jurisdiction of this court,

It Is Further Ordered, Adjudged and Decreed that the question of damage to fish which might result from construction of plaintiff's Cowlitz Project was passed upon by the Federal Power Commission and the Federal Courts and is not now a proper one for consideration by this Court.

It Is Further Ordered, Adjudged and Decreed that Sections 27 and 36, Chapter 117, Laws of 1917, as amended (R.C.W. 90.20.010 and 90.28.060) are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.

It Is Further Ordered, Adjudged and Decreed that the provisions of Chapter 9, Laws of 1949, (R. C. W. 75.20.010 et seq), and Sections 46, and 49, Chapter 112, Laws of 1949, as amended (R.C.W. 72.20.050 and 75.20.100), are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.

It Is Further Ordered, Adjudged and Decreed that the plaintiff is acting illegally and in excess of its authority in the construction of the Mayfield and Mossyrock hydroelectric project as presently proposed for the reason that said project would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of R. C. W. 80.40.010 et seq.

It Is Further Ordered, Adjudged and Decreed that the injunction pendente lite, entered October 7, 1955, be continued in effect until July 1, 1956, from and after which later date plaintiff is hereby enjoined from spending any sums of money relating to the Mayfield and Mossyrock hydroelectric project.

[fol. 322] Plaintiff excepts to the provisions of the last two paragraphs of this Judgment, the defendant Taxpayers except to the first paragraph of this Judgment and further except to the last paragraph as authorizing any further expenditure of sums of money, and Defendant State of Washington excepts to the first three paragraphs of this Judgment, and all exceptions are hereby allowed.

Done in Open Court this 6th day of March, 1956.

/s/ Charles T. Wright, Judge.

Presented by:

/s/ Joseph T. Mijich, Assistant Attorney General, Attorney for Defendant Directors and the State of Washington.

/s/ Lynch & Lynch, Attorneys for Defendant Taxpayer.

Proof of service (omitted in printing).

[File endorsement omitted]

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[323] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THURSTON COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed March 14, 1956

To: The Taxpayers of Tacoma, Washington, Defendants, and Lynch and Lynch, their attorneys, and Robert Schoettler, as Director of Fisheries, and John A. Biggs, as Director of Game, of the State of Washington, and the State of Washington, a sovereign State, Defendants, and Don Eastvold, Attorney General, and Joseph T. Mijich and E. P. Donnelly, Assistant Attorneys General, their attorneys:

You and each of you are hereby notified that the City of Tacoma, the plaintiff above named, feeling aggrieved thereby, hereby appeals to the Supreme Court of the State of Washington from that part of that certain judgment made and entered herein by the above entitled court on

March 6, 1956, constituting the 5th and 6th paragraphs thereof reading as follows:

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff is acting illegally and in excess of its authority in the construction of the Mayfield and Mossyrock hydroelectric project as presently proposed for the reason that said project would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of R.C.W. 80.40.010 et seq.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the injunction pendente lite, entered October 7, 1955, be continued in effect until July 1, 1956 from and after which later date plaintiff is hereby enjoined from spending any sums of money relating to the Mayfield and Mossyrock hydroelectric project."

and further from all intermediate orders and determinations involving the merits of and affecting said parts of [323a] said judgment.

Dated at Olympia, Washington, March 14, 1956.

/s/ E. K. Murray, Special Counsel, /s/ Clarence M. Boyle, City Attorney, /s/ Marshall McCormick, Chief Asst. City Attorney, /s/ Frank L. Bannon, Chief Asst. City Attorney, Attorneys for Plaintiff.

[File endorsement omitted]

Proof of service (omitted in printing).

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[330] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF THURSTON

[Title omitted]

NOTICE OF CROSS-APPEAL—Filed March 21, 1956

To: The City of Tacoma, a municipal corporation, Plaintiff, and E. K. Murray, Clarence M. Boyle, Marshall McCormick and Frank L. Bannon, its attorneys:

You and each of you are hereby notified that the taxpayers of Tacoma, Washington, Robert Schoettler as director of fisheries, and John A. Biggs as director of game of the State of Washington, and the State of Washington, a sovereign state, defendants above named, and each of them, hereby cross-appeal to the supreme court of the State of Washington from that part of that certain judgment made and entered herein by the above-entitled court on March 6, 1956, constituting the first, second, third and fourth paragraphs thereof reading as follows:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the question of the capacity of the plaintiff to acquire property of the defendant, State of Washington, by eminent domain is not within the jurisdiction of this court.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the question of damage to fish which might result from construction of plaintiff's Cowlitz Project was passed upon by the Federal Power Commission and the Federal Courts and is not now a proper one for consideration by this Court.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Sections 27 and 36, Chapter 117, Laws of 1917, as amended (R.C.W. 90.20.010 and 90.28.060) are inappli- [331] cable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the provisions of Chapter 9, Laws of 1949, (R.C.W. 75.20.010 et seq.), and Sections 46, and 49, Chapter 112, Laws of 1949, as amended (R.C.W. 72.20.050 and 75.20.100), are enapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project."

and from all intermediate orders and determinations involving the merits of and affecting said parts of said judgment.

Dated at Olympia, Washington this 21st day of March, 1956.

Lynch & Lynch, By /s/ John S. Lynch, Jr., Attorneys for Defendant Taxpayers, /s/ Don Eastvold, Attorney General, /s/ Joseph T. Mijich, Assistant Attorney General, /s/ E. P. Donnelly, Assistant Attorney General, Attorneys for Defendant Directors and the State of Washington.

[File endorsement omitted]

Proof of service (omitted in printing).

[fol. 332] [Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 437] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 33706

THE CITY OF TACOMA, a municipal corporation, Appellant,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a sovereign State, Respondents and Cross-appellants.

AFFIDAVIT OF HENRY A. COLE IN SUPPORT OF MOTION FOR FURTHER STAY—Filed June 19, 1956

State of Washington,
County of Pierce, ss.:

Henry A. Cole, being first duly sworn, on oath, deposes and says:

I am Manager of the Major Projects Division of the Department of Public Utilities of the City of Tacoma, and as such, in general charge of its Cowlitz Power Project Development, and make this affidavit in support of said City's motion, as set forth on pages 50 to 52 inclusive, and pages 129 to 131 inclusive, of the Brief of Appellant, and on pages 58 to 60 inclusive, of the Reply Brief of Appellant herein, for a further stay or postponement pending decision on and final disposal of this appeal by this court, of the impending injunction from which this appeal is taken, and which is now set to become effective on July 1, 1956.

Reference is hereby made of the comprehensive affidavits of this affiant (Tr 284-290), Dean Barline, Director of Public Utilities of the City (Tr 291-292), L. E. Dixon, General Contractor for the Mayfield Dam (Tr 293-295), and E. K. Murray, Special Counsel for the City in this cause (Tr [fol. 438] 296-306), filed in the court below and made a part of the record on this appeal. The Trial Court, pursuant to the showing made in said affidavits, postponed effective date of such injunction to July 1, 1956, to allow time for disposal of this appeal, or for application to this court for further stay or postponement of said date if necessary.

Such further stay or postponement now is necessary if the hazard and damage described in said affidavits is to be avoided. Said affidavits show that the City would suffer great and irreparable damage, possibly amounting to several million dollars, by forced suspension of its work before final disposal of the appeal, and to a great extent deny it of the fruits of its appeal, if successful.

Said affidavits were offered before the Trial Court upon a similar application, but now apply here with even increased force, since the work has now further advanced and the time which will elapse before a decision can be had is considerably shorter.

The number of persons now employed by the General Contractor and his sub-contractors on the project is approximately 115, and by the City approximately 110, and said work, as of May 31, 1956, was estimated at 18.6% complete.

Henry A. Cole

Subscribed and sworn to before me this 19th day of June, 1956.

James F. Henriot, Notary Public in and for the State of Washington, residing at Tacoma.

Proof of service (omitted in printing).

[fol. 439] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

ORDER CONTINUING INJUNCTION PENDENTE LITE IN EFFECT—June 28, 1956

The above-entitled matter having come on for hearing on June 25, 1956, before this court sitting *en banc*, upon the appeal of the city of Tacoma; and the appellant having moved that the injunction *pendente lite* heretofore entered by the trial court be continued in effect pending decision on and final disposition of this case by this court; and

It appearing that the original injunction *pendente lite*, entered by the superior court for Thurston county on October 7, 1955, was continued in effect until July 1, 1956, in the final judgment of that court which was signed by Judge Charles T. Wright on the 6th day of March, 1956, from which this appeal is taken; and

This court having considered the affidavits of Henry A. Cole, superintendent of light of the city of Tacoma and chief engineer in charge of its Cowlitz power project; Dean Barline, director of public utilities of the city of Tacoma; L. E. Dixon, vice-president of Arundel corporation and president of L. E. Dixon Company, general contractors for the Mayfield dam, and E. K. Murray, special [fol. 440] counsel for the city of Tacoma; and

It further appearing, from the averments contained therein, that the city of Tacoma would suffer great and irreparable damage by forced suspension of its work before final disposition of this appeal, thereby denying it the

fruits of this appeal if successful; and counsel for appellant having stated in open court that, if its appeal is not successful, it will be able to dispose of its property and rights in the premises without loss because of expenditures made subsequent to July 1, 1956; and the court having heard oral arguments presented on behalf of appellant and respondents, and having considered the showing made in the foregoing affidavits made by affiants who are desirous of having the injunction *pendente lite* continued in effect, and having considered the questions and issues presented by the motion; it is hereby

Ordered that the injunction *pendente lite* heretofore referred to, which would otherwise expire on July 1, 1956, be, and the same is hereby, continued in effect until the further order of this court.

Dated June 28, 1956.

By the Court:

Charles T. Donworth, Acting Chief Justice.

[fol. 441] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 33706

THE CITY OF TACOMA, a municipal corporation, Appellant,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State, Respondents and Cross-appellants.

EN BANC OPINION—Filed February 7, 1957

This action was instituted by the city of Tacoma against the taxpayers of Tacoma and the directors of game and

fisheries of the state of Washington, pursuant to the declaratory judgment act (RCW 7.24.010, *et seq.*) and RCW 7.24.150, *et seq.*, to test and determine plaintiff's right to issue and sell certain utility revenue bonds to finance the construction of two power dams on the Cowlitz river in Lewis county.

The action was commenced in Pierce county; later, by stipulation and order of court, it was transferred to Thurston county.

The case was here on a prior appeal. *Tacoma* v. *Taxpayers*, 43 Wn. (2d) 468, 262 P. (2d) 214 (1953). This court reversed the judgment of dismissal entered by the trial court after sustaining defendant taxpayers' demurrer to the [fol. 442] original complaint. (We refer to that decision for an understanding of the material facts involved on the first appeal.)

The case was remanded to the superior court for further proceedings in accordance with the views therein expressed.

Preliminary to a discussion of the merits of this case, we point out that the city of Tacoma was granted a license by the Federal Power Commission, after hearings held in 1951, to construct the two dams on the Cowlitz river. The state of Washington, represented by the attorney general; the directors of game and fisheries, cross-appellants, and Washington State Sportsmen's Council, Inc. (not a party to the present case), were given notice of the hearings and appeared before the Federal Power Commission and actively participated in that proceeding. The parties petitioned the court of appeals for the ninth circuit to review the decision of the Federal Power Commission (*In the Matter of the City of Tacoma, Washington, Project No. 2016*); the commission's decision was affirmed. *State of Washington Department of Game* v. *Federal Power Commission*, 207 P. (2d) 391 (C.A. 9th, 1953), cert. den. 347 U.S. 936, 98 L. Ed. 1087, 74 S. Ct. 626 (1954).

The proceedings in the superior court, between October 14, 1953, the date the remittitur of this court was filed, and March 6, 1956, the date of the final judgment from which the present appeal and cross-appeal are taken, are set forth in the lengthy transcript on appeal. It would unduly extend this opinion to give a resume of the various [fol. 443] pleadings, motions, and orders.

After our former opinion, the trial court entered an order overruling taxpayers' demurrer to the complaint. The taxpayers of Tacoma filed an answer and cross-complaint, denying that the Federal license had any legal force or effect, and affirmatively alleged that the city had exceeded its authority under the state statutes. The city's demurrer was sustained to the cross-complaint.

April 29, 1954, the directors of game and fisheries filed a second amended answer and cross-complaint that, in substance, was similar to prior pleading, except they alleged, for the first time, that the Cowlitz river is nonnavigable at the dam sites.

April 29, 1954, the city of Tacoma filed a petition praying that attorneys' fees as costs be fixed and determined, and that the city's liability for further legal services be terminated in accordance with the provisions of the declaratory judgment act. The petition stated that nothing further remained to be done by the taxpayers of Tacoma, except to establish the allegations of the complaint (if denied) and enter judgment. The prayer requested that the taxpayers be denied costs for attorneys' fees in connection with their cross-complaint.

On the same date, the taxpayers of Tacoma answered. They said they had done all that was expected of them; that they had filed an answer and cross-complaint, because it was the only further step they could take; and that they should be allowed costs and attorneys' fees.

[fol. 444] April 29, 1954, the superior court entered an order absolving the taxpayers from any further defense or prosecution of the action. Subsequently, the superior court fixed the amount of attorneys' fees to be paid by the city to the taxpayers.

June 24, 1955, the directors of game and fisheries filed a motion for a temporary restraining order and injunction, *pendente lite*, to enjoin further development and construction of the Cowlitz project and the sale of the proposed bond issue. The affidavit of an assistant attorney general, filed in support of this motion, alleges that a large portion of certain state highways would be inundated and must, of necessity, be condemned; and that

"Ordinance No. 14386 authorizes the condemnation of the state game hatchery, known as the Mossyrock Hatchery, located on the Cowlitz River. This hatchery is located on Government Lots 4, 7, 8, and 9, Section 11, Township 12 North, Range 2 East Willamette Meridian, in Lewis County, Washington. The state also has a water right there. The reservoir created by the Mayfield Dam will inundate and overflow the entire hatchery. This hatchery site has been segregated from the public domain and already appropriated to a public use.

"The City of Tacoma, being a limited arm of the state government, cannot condemn property such as this already dedicated to a public use. *State* v. *Superior Court*, 91 Wash. 454, 157 Pac. 1097 (1916). Therefore, the ordinance authorizing such condemnation is invalid and the City is proceeding contrary to the laws of the State of Washington. Affiant alleges that no agreement between the City of Tacoma and state authorities has been reached, and that legislative action will be necessary before Tacoma can build the project. There has been no such legislative action as yet.

"On June 21, 1955, the City of Tacoma awarded bids for the purchase of Tacoma city Light revenue bonds, totalling $15,000,000, to pay for the construction of part of the Mayfield Dam. Affiant is informed and believes that the City will deliver said bonds to the purchasers in the immediate future; on June 22, 1955, the City of Tacoma awarded the contracts for the construction of the Mayfield Dam, and the City intends to authorize the commencement of said construction in the immediate future.

"Affiant is informed and believes that if the threatened acts of the plaintiff in delivering the bonds and [fol. 445] commencing construction of the Mayfield Dam are not enjoined pending the outcome of this action, irreparable injury will result to the State of Washington in that part or all of the fish runs in the Cowlitz River will be destroyed for which adequate damages cannot be ascertained. Also, if invalid bonds are permitted to be on the market, the public will suffer

and it is the responsibility of the State of Washington to prevent this."

On the filing of this motion and affidavit, the superior court, *ex parte*, issued a temporary restraining order and order to show cause. It enjoined the city from directly or indirectly developing, constructing or contracting for the construction of the two dams; from delivering or permitting the sale of any bonds for the payment of costs of the Cowlitz project, and ordering the respective parties to appear at a hearing on the matter on August 8, 1955.

June 28, 1955, the city of Tacoma, appellant, filed a motion to quash and dissolve the temporary restraining order. It was supported by affidavits that stated in substance: (a) that the action had been pending for more than two years; (b) that during this time the directors of game and fisheries had known that the city contemplated calling for bids on contracts and the sale of bonds; (c) that for the past year this action had awaited the ruling of the superior court upon the city's demurrer to the directors' second amended cross-complaint; (d) that the protection of fish in the Cowlitz river was a matter for presentation before the Federal Power Commission; (e) that all matters proper for determination herein had been decided by the supreme court of this state upon the first appeal. (*Tacoma* v. *Taxpayers*, *supra*) [fol. 446]; (f) that the judgment in the case, entitled *State of Washington Department of Game* v. *Federal Power Commission*, *supra*, was *res judicata* as to all other matters pleaded by the directors of game and fisheries in their second amended answer and cross-complaint; (g) and, that the continuation of the temporary restraining order would result in irreparable damage to the city of Tacoma. A hearing on the motion to quash was set for June 30, 1955. July 7, 1955, the court modified the temporary restraining order to read:

> . . . Plaintiff [appellant] and its officers and agents be and they are hereby restrained and enjoined from doing any act or thing in any manner interfering with the bed or waters of the Cowlitz River in connection with its Mayfield and Mossyrock Dam Projects, or in any way injurious to the fish runs or fish resources of said river, . . ."

July 27, 1955, the city filed an amended complaint. July 29, 1955, the directors of game and fisheries moved to *substitute* the sovereign state of Washington as a defendant in this action. The affidavit, in support of this motion, alleged:

> "The proposed project will affect lands, structures, waters, and fish, the ownership and jurisdiction over which is in the State of Washington *and not in the above-named defendants* [directors of game and fisheries]; and, therefore, the real party in interest, of this action, which will be affected by the decision of this Court is the State of Washington."

Over objection of the city, August 8, 1955, the court entered an order granting permission "to add the State of Washington as a party defendant herein . . ."

August 29, 1955, the directors of game and fisheries and the state of Washington filed an answer and cross-complaint to the city's amended complaint. They alleged: (a) that the Cowlitz project would interfere with *public naviga-* [fol. 447] *tion* on the Cowlitz river, which the city is prohibited from doing under the provisions of RCW 80.40.010; (b) that appellant had not obtained an extension of time beyond December 31, 1955, to commence construction; (c) *that the proposed Cowlitz project would damage and destroy state lands dedicated to a public use that the city of Tacoma, as a municipal corporation, is unable to acquire;* (d) that the city had not complied with the provisions of RCW 90.28.010 (permission to inundate state highways), and RCW 90.20.010, *et seq.* (water appropriation permit); (e) and, that the city had attempted to circumvent state laws by commencing an action in Federal district court at Tacoma. (The city states in its brief that it voluntarily dismissed this action.)

September 27, 1955, the directors of game and fisheries and the state of Washington filed a joint amended answer and cross-complaint. It contained, substantially, the same matters as the directors' prior pleading, except that the various parcels of state land devoted to public uses were described by legal description. There was an added allega-

tion and exhibit which, in substance, indicated that the state game commission had passed a resolution August 16, 1955, instructing the director of game to take every legal procedure to resist any effort of the city to condemn or in any manner acquire the Mossyrock fish hatchery, because it was irreplaceable.

October 7, 1955, the trial court entered a restraining order *pendente lite*. It modified the temporary restraining [fol. 448] order of July 7, 1955, by inclusion of the following proviso:

> "... PROVIDED HOWEVER, that the plaintiff, its agents, employees and officers, be and they are hereby authorized to construct the coffer dam for the powerhouse site and to do blasting necessary to construction, Provided that no blasting shall take place in the waters of the Cowlitz River."

October 11, 1955, the trial court entered an order, over objection of the city, appointing new attorneys to represent "all taxpayers of the City of Tacoma." The taxpayers, theretofore appointed, had withdrawn from the proceeding and had defaulted within the provisions of the declaratory judgment act.

November 30, 1955, the newly appointed attorneys, upon behalf of all taxpayers, filed an answer and affirmative defense to the city's amended complaint. It contained virtually the same allegations as the amended answer and cross-complaint of the directors and the state of Washington.

January 3, 1956, the parties filed a pretrial conference stipulation and order. It stated: (a) that the city had entered into contracts for the construction of the Mayfield dam, and that construction had been commenced; (b) that two ordinances, amendatory of ordinance No. 14386, had been passed; (c) that a license to build the dams had been issued appellant by the Federal Power Commission; (d) *that completion of the dams and closing of the gates would inundate a large portion of a fish hatchery, owned and operated by the state, as well as other state land, as described in the pleadings;* (e) that the directors of fisheries and game, if permitted, would show probability of injury to fish; (f) that the city had not yet obtained permission to in-

[fol. 449] undate state highways, under the provisions of RCW 90.28.010, but that plans had been submitted for review to the director of highways; (g) that the city had used and would continue to use surplus funds of its light utility to pay costs of the Cowlitz project, and would issue and sell revenue bonds of its light utility therefor.

January 5, 1956, the trial judge wrote a letter to counsel. We quote, in part:

> "After reading briefs the Court feels that testimony can be limited to the question of navigation. . . .
>
> "Upon the question of damage to fish the Court is of the opinion that the decision of the Federal Power Commission and the decision of the Supreme Court of this state are controlling.
>
> *"Upon the question of relocation of the fish hatchery, the Court is of the opinion that only a question of law is presented. The question of law will relate to the extent of the powers of condemnation given to plaintiff under the license from the Federal Power Commission. . . ."*

The case was tried January 11, 1956, upon the city's *amended* complaint, the taxpayers' answer and affirmative defense, and the directors' and state's amended answer and cross-complaint, as limited by the stipulation and the above-quoted letter. Findings of fact and conclusions of law were made; judgment was entered March 6, 1956. The trial court declared the status of the parties to be as follows:

> "It Is Hereby Ordered, Adjudged and Decreed that the question of the capacity of the plaintiff to acquire property of the defendant, State of Washington, by eminent domain is not within the jurisdiction of this court,
>
> "It Is Further Ordered, Adjudged and Decreed that the question of damage to fish which might result from construction of plaintiff's Cowlitz Project was passed upon by the Federal Power Commission and the Federal Courts and is not now a proper one for consideration by this Court.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Sections 27 and 36, Chapter 117, Laws of 1917, as [fol. 450] amended (R.C.W. 90.20.010 and 90.28.060) are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the provisions of Chapter 9, Laws of 1949, (R.C.W. 75.20.010 et seq.), and Sections 46, and 49, Chapter 112, Laws of 1949, as amended (R.C.W. 72.20.050 and 75.20.100), are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff is acting illegally and in excess of its authority in the construction of the Mayfield and Mossyrock hydroelectric project as presently proposed for the reason that said project *would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of R.C.W. 80.40.010 et seq.*

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the injunction pendente lite, entered October 7, 1955, be continued in effect until July 1, 1956, from and after which later date plaintiff is hereby enjoined from spending any sums of money relating to the Mayfield and Mossyrock hydroelectric project." (Italics ours.)

June 28, 1956, the chief justice continued the injunction *pendente lite*.

The city of Tacoma (appellant) has made fifteen assignments of error. The taxpayers of Tacoma, the directors of game and fisheries, and "The State of Washington, a Sovereign State" (respondents and cross-appellants) have made two assignments of error on their cross appeal.

Although this action has evolved into a Hydra-headed controversy, a single question at its nucleus is determinative of its disposition.

Does a municipal corporation, created by the state as a subordinate unit, have the power to condemn state lands held in a governmental capacity and previously dedicated to [fol. 451] a public use; and if not, can a municipal corporation be endowed by Federal legislation with power to condemn such lands belonging to the state?

This question is neither abstract nor academic. The state-owned Mossyrock Fish Hatchery and the land necessary for its operation, which are of substantial value, will be inundated by the proposed dam. In the sense that the question requires a definition of the powers of the sovereign state and one of its created agencies, the problem is a local one peculiarly within the province of the courts of this state; hence, assuming, *arguendo,* that the question was before the court of appeals for the ninth circuit in *State of Washington Department of Game* v. *Federal Power Commission,' supra,* (an erroneous assumption, as we point out later in this opinion), it is not *res judicata* against the state of Washington.

This precise question is presented to us by cross-appellants' (the taxpayers, the directors, and the state) first assignment of error, which reads as follows:

> "The court erred in making and entering its conclusion of law No. III and in entering its judgment, dated March 6, 1956, insofar as it included therein paragraph I reading:
>
> "'It Is Hereby Ordered, Adjudged and Decreed that the question of the capacity of the plaintiff to acquire property of the defendant, State of Washington, by eminent domain *is not within the jurisdiction of this court.*'" (Italics ours.)

The city (appellant and cross-respondent) argues that this question is not before us. Two reasons are given: first, that the taxpayers of Tacoma (respondents and cross-appellants) are precluded by the law of the case as declared on the first appeal to this court; and second, that Robert

[fol. 452] Schoettler, as director of fisheries, and John A. Biggs, as director of game of the state of Washington, and "The State of Washington, a Sovereign State" (respondents and cross-appellants) are bound by the doctrine of *res judicata.*

In support of these reasons, our former opinion in this case (*Tacoma* v. *Taxpayers, supra*) and the opinion of the United States Court of Appeals in *State of Washington Department of Game* v. *Federal Power Commission, supra,* are cited, analyzed, and discussed.

If the state of Washington, in its sovereign capacity, is not bound by the theory advanced by the city, we reach the question of the city's power to condemn state lands previously dedicated to a public use. The position of the remaining parties, and the other assignments of error, would not require examination.

We are inclined to the view that the theory advanced by the city does not apply to the taxpayers of Tacoma nor to the directors of game and fisheries. This is based upon the following: (a) in our former decision, the sole question before this court was whether the city's *first* complaint stated a cause of action; (b) neither our former opinion nor the opinion of the Federal court of appeals discussed the question of the city's power and capacity to condemn state-owned property previously dedicated to a public use—in fact, the latter opinion excludes the question; (c) the question did not appear until pleaded *after* we had remanded the case to the trial court; (d) the case is now before us after *trial* of issues formed by the city's *amended* [fol. 453] complaint, filed July 27, 1955, and the answers, affirmative defenses, and cross-complaints thereto.

Since we base our conclusion that the trial court should be affirmed upon other grounds, we do not deem it necessary to expand our reasons for concluding that the taxpayers of Tacoma and the directors of game and fisheries are not precluded by the law of the case and the doctrine of *res judicata.*

The state of Washington, in its sovereign capacity, is not bound by the doctrine of *res judicata* (assuming, *arguendo,* that the issue involved has been before a court of competent jurisdiction), for the manifest reason that *the state was*

not a party to this action at the time our former decision was rendered.

The state of Washington became a party defendant by order of court, entered August 8, 1955. The order was entered on motion of the director of fisheries and game, supported by an affidavit, the allegations of which we quoted *supra*.

An attempt is made to avoid the conclusion that the state did not become a party to this action until August 8, 1955, upon the authority of *State* v. *Pacific Telephone and Telegraph Co.*, 9 Wn. (2d) 11, 113 P. (2d) 542 (1941). We do not find the case apposite.

We have not overlooked the fact that the state-owned land involved is not in Pierce county, where this action was commenced, nor in Thurston county, to which this action was transferred by stipulation and order of court; but this is *not* a condemnation action. It involves a deter- [fol. 454] mination of the *power to condemn*, not the actual condemnation. In *Donaldson* v. *Greenwood*, 40 Wn. (2d) 238, 250, 242 P. (2d) 1038 (1952), we quoted with approval:

> "'A state can exercise through its courts jurisdiction to order or to forbid the doing of an act within the state, although to carry out the decree may involve doing an act or affecting a thing in another state.' Restatement, Conflict of Laws, 147, § 97."

A fortiori, since the parties and the issue were before the superior court of Thurston county, it had jurisdiction to resolve the question of the power of the city to condemn state-owned lands. In this respect, the trial court erred in the first paragraph of its decree, quoted *supra*, in which it said that

> ". . . the question of the capacity of the plaintiff to acquire property of the defendant State of Washington by eminent domain is not within the jurisdiction of this court."

In *Pacific Telephone and Telegraph Co.* v. *Henneford*, 195 Wash. 553, 81 P. (2d) 786 (1938), the plaintiff company secured an injunction against the state tax commis-

sioner, enjoining him from collecting a certain use tax. Three years later, the state commenced an action against the company to recover the same tax. In *State* v. *Pacific Telephone and Telegraph Co., supra,* this court held that the first action was *res judicata* of the second, saying:

> "This court has held that, where an action is brought by or against the officers of a state which affects the right of the state *to collect its revenue,* it is, in effect, an action by or against the state. [Citing cases.]" (Italics ours.)

Thus, the court limited its decision to the particular facts before it; namely, the collection of revenue. Finally, the court announced the guide to be followed when it said:

> "The general rule is that a judgment for or against the state or an officer or agency thereof *in matters as* [fol. 455] *to which such officer or agency is entitled to represent the state in litigation,* is conclusive for or against the state. . . . The test as to whether a judgment in a prior action brought against officers of the state is *res judicata* as against the state in a second action involving the same subject-matter, *depends upon whether the officers have authority to represent the interests of the state* in the prior action. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 84 L. Ed. 1263, 60 S. Ct. 907." (Italics ours.)

The departments and directors of fisheries and game are charged with the duty of enforcing state laws, and rules and regulations of the departments relative to the conservation of food fish and game fish. The directors have statutory authority to represent and bind the state by their actions, only in matters relating to the conservation of food fish and game fish. Under the statutes, their sole concern is the conservation of food fish and game fish; they are not concerned with ownership of lands by the state in its sovereign capacity.

> "The State does not legally become a party to a suit brought on its behalf unless the suit is brought by some officer having statutory authority so to do and a suit

brought by the State Tax Collector, which he had no statutory authority to bring is not binding on the State and the decree therein is not res adjudicata against the State." *State* v. *Rogers,* 206 Miss. 643, 39 So. (2d) 533 (1949).

In *People* v. *Birch Securities Co.,* 86 Cal. App. (2d) 703, 196 P. (2d) 143 (1948), the court said:

> "It will be observed the former federal judgment, which was offered in evidence as a bar to this action, was merely against certain named officers of the state as such, and not against the State of California. That case was not a suit against the State of California, and is therefore not res judicata in this action or an estoppel against the state maintaining this action for unpaid franchise taxes. *When a suit is brought only against individually named officers of a state, as such, it is ordinarily not an action against or binding upon the state.*" (Italics ours.)

The state became a party defendant to this action on [fol. 456] August 8, 1955, subsequent to the first appeal; hence, neither the doctrine of the law of the case, as purportedly established by our first opinion, nor the doctrine of *res judicata* applies to the state of Washington, and this court must consider the question posed.

In a recent *En Banc* decision (*State ex rel. Eastvold* v. *Yelle,* 46 Wn. (2d) 166, 168, 279 P. (2d) 645 (1955)), this court said:

> "The power of eminent domain is inherent in sovereignty and does not depend for its existence on a specific grant in the constitution. The provisions found in a state constitution do not by implication grant the power to the government of a state, but limit a power which otherwise would be without limit. *State ex rel. Eastvold* v. *Superior Court,* 44 Wn. (2d) 607, 609, 269 P. (2d) 560 (1954)."

In *Lauterbach* v. *Centralia,* 149 Wash. Dec. 528, 532, —— P. (2d) —— (December 5, 1956), we again defined a municipal corporation and described its powers as follows:

> "A municipal corporation is a body politic established by law as an agency of the state—partly to assist in the civil government of the country, but chiefly to regulate and administer the local and internal affairs of the incorporated city, town, or district. *Columbia Irr. Dist.* v. *Benton County*, 149 Wash. 234, 235, 270 Pac. 813 (1928). *It has neither existence nor power apart from its creator, the legislature,* except such rights as may be granted to municipal corporations by the state constitution." (Italics ours.)

A municipal corporation does not have an inherent power of eminent domain. It may exercise such power only when it is expressly authorized to do so by the *state legislature. Tepley* v. *Sumerlin*, 46 Wn. (2d) 504, 507, 282 P. (2d) 827 (1955), and cases cited. This is consistent with the general proposition that

> ". . . a municipal corporation, being but a creature of the state, derives its existence, powers, and duties *from the legislative body* of the state. 37 Am. Jur. 620, [fol. 457] § 4, and p. 626, § 7. 2 McQuillin, Municipal Corporations (3d ed.) 12, § 4.04; 578, § 10.03." *Othello* v. *Harder*, 46 Wn. (2d) 747, 752, 284 P. (2d) 1099 (1955). (Italics ours.)

Of course, by statute, the state may delegate the power of eminent domain to one of its political subdivisions; but such statutes are strictly construed. Lewis in 1 Eminent Domain (3d ed.) 679, § 371, states:

> "The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. When the right to exercise the power can only be made out by argument and inference, it does not exist. '*There must be no effort to prove the existence of such high corporate right, else it is in doubt; and, if so, the State has not granted it.*'" (Italics ours.)

This is cited with approval in *State ex rel. Chesterley* v. *Superior Court*, 19 Wn. (2d) 791, 800, 144 P. (2d) 916 (1944).

It follows, that the state may delegate, to one of its political subdivisions, the power to condemn state-owned property. However,

> "... the principal question that arises in connection with the right of a particular subdivision or agency to take state-owned lands is whether the legislature has authorized such subdivision or agency so to do. This is, of course, a problem of statutory construction, and it may be said in this connection that there is a clear tendency on the part of the courts against interpreting governing statutory provisions in favor of the existence of such authorization *in the absence of clear expression of the legislative intention to that effect*. This tendency is attributable to such considerations as the general principle of statutory construction that where a statute is general in its terms and thereby any prerogative, right, title, or interest is taken from the state, the latter is not bound unless the statute is made to extend to it by express words; the general rule that property devoted to a public use may not be taken under the power of eminent domain for an inconsistent use unless the right to do so is conferred expressly or by necessary implication." (Italics ours.) Annotation: "Eminent domain: power of one governmental unit or agency to take property of another such unit or agency." 91 L. Ed. 221, 259 (1947).

[fol. 458] In *State* v. *Superior Court*, 91 Wash. 454, 157 Pac. 1097 (1916), this court held that a statute authorizing railroad corporations to condemn lands, including lands granted to the state, refers to state lands held only in a proprietary capacity, and does not include state lands segregated from the public domain and appropriated to a public use by due dedication, saying:

> "Indeed, if this be not the rule, the legislature has, by the act in question, granted to railway companies power to condemn any of the state lands for railway

> purposes (save that of course which is specially exempted), which would include the lands on which its capitol buildings are situated." (459)

The following remark made by this court in *Seattle & Montana Ry. Co.* v. *State*, 7 Wash. 150, 152, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L.R.A. 217 (1893), is pertinent:

> "As well might it be contended that because a railroad is authorized to enter upon and condemn 'any' land for its tracks, depots, shops, round houses, etc., it could by serving notice upon the auditor of Thurston county, take the entire ten acres upon which the state capitol stands for a depot and shops." (p. 152)

In *State ex rel. Attorney General* v. *Superior Court*, 36 Wash. 381, 385, 78 Pac. 1011 (1904), this court said:

> "Since the rule prevails that condemnation statutes must be strictly construed, as far as they relate to the taking of private property, it follows, with even more force, that the same rule must apply where the lands of the sovereign are sought to be taken." (p. 385)

We deem it conclusively settled in this jurisdiction that a municipal corporation or a public corporation does not have the power to condemn state-owned lands dedicated to a public use, unless that power is clearly and expressly conferred upon it by statute.

[fol. 459] After a careful review of RCW 8.12.030 and RCW 80.40.010, and other statutes to which our attention has been directed, we do not find that the legislature has expressly authorized a municipal corporation to condemn state-owned land previously dedicated to a public use; hence, we conclude that the city of Tacoma has not been endowed with the statutory capacity to condemn such lands.

There remains the subsidiary question: can a municipal corporation of this state be endowed, by Federal legislation, with power to condemn state-owned lands previously dedicated to a public use, in the absence of power and capacity so to act under state statutes; or, specifically, can the city of Tacoma receive the power and capacity to condemn

state-owned lands previously dedicated to a public use, from the license issued to it by the Federal Power Commission in the absence of such power and capacity under state statutes?

This is not a question of the right of the Federal government to control all phases of activity on navigable streams, nor a question of its power, under the Federal power act, to delegate that right. It only questions the capacity of a municipal corporation of this state to act under such license when its exercise requires the condemnation of state-owned property dedicated to a public use.

The question of the legal capacity of the city of Tacoma to act under the license issued by the Federal Power Commission is specifically excluded from consideration in *State* [fol. 460] *of Washington Department of Game* v. *Federal Power Commission, supra.* The court said:

> "Consistent with the First Iowa case, *supra,* we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States. However, *we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted.* There may be limitations in the City Charter for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them." (p. 396) (Italics ours.)

Hence, this case is not *res judicata* against the state of Washington. As we have heretofore pointed out, the city does not have the capacity to act under the license. Its inability to act, in the manner which we have discussed, is inherent in its very nature. *Its inability so to act can be remedied only by state legislation that expands its capacity.*

We find nothing inconsistent with this conclusion in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U. S. 152, 90 L. Ed. 1143, 66 S. Ct. 906 (1946). Therein, the court held (rightfully, we believe) that a state

could not, by statute, require the petitioner to secure a state permit to build the dam *when the subject matter of the state statutory prohibitions was exclusively within the jurisdiction of the Federal government.* The court said:

> "To require the petitioner to secure the actual grant to it of a state permit under § 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the [fol. 461] effectiveness of the Federal Act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." (p. 164)

In *Tacoma* v. *Taxpayers,* 43 Wn. (2d) 468, 489, 262 P. (2d) 214 (1953), this court said:

> ". . . It [the Federal government] intended to exercise its full jurisdiction to authorize the power commission to supersede *state laws purporting to prohibit or limit the construction of dams* on navigable streams." (p. 489) (Italics ours.)

In the instant case, the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition;* it presents a question of *lack of state statutory power* in the city. It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the state of Washington.

The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal power act, as we read it, does not purport to do so.

If it be held that the Federal government may endow a state-created municipality with powers greater than those given it by its creator, the state legislature, a momentous and novel theory of constitutional government has been

evolved that will eventually relegate a sovereign state to a position of impotence never contemplated by the framers [fol. 462] of our constitutions, state and Federal.

Therefore, for the reasons we have set forth and discussed herein, the judgment of the superior court is affirmed.

Weaver, J.

We concur:

Hill, C.J., Schwellenbach, J., Rosellini, J., Ott, J.

[fol. 463] No. 33706

Hill, C.J. (concurring specially)—I have signed the majority opinion, but in fairness to all concerned it should be stated that this case had been assigned to one of the judges whose opinion did not prevail, and the case was not assigned to Judge Weaver for opinion until January 11, 1957.

Hill, C.J.

[fol. 464] Donworth, J. (dissenting)—I find myself in disagreement with the majority opinion for three reasons, which are stated below. Because of the importance of the constitutional question relating to the conflict between state and Federal powers, I deem it proper to state my views at some length.

My first two reasons, if valid, make it unnecessary to consider the third reason (the constitutional question). They are:

First, respondents (taxpayers of Tacoma) and cross-appellants (directors of fisheries and game, respectively) are precluded from raising the constitutional question because the law of the case was established on the first appeal (43 Wn. (2d) 468).

Second, the state is precluded from raising that question because it and cross-appellants are bound by the decision of the court of appeals for the ninth circuit in *State of Washington Department of Game et al.* v. *Federal Power*

Commission, 207 F. (2d) 391, which is *res judicata* of this controversy.

The third reason is that, even assuming *arguendo* that the two doctrines of the law of the case and *res judicata* are not applicable, the majority opinion is in error in holding that appellant, under the facts shown in this record, has no power to condemn state-owned lands previously dedicated to public use when the legislature has not given it the power to so act.

In considering the first reason stated above, it is necessary to have in mind the issues which were raised or could have been raised on the first appeal (43 Wn. (2d) 468). The demurrer to the complaint which was before this court on the first appeal admitted all facts well pleaded therein and reasonable inferences to be drawn therefrom. *Slater* v. *Bird*, 40 Wn. (2d) 848, 246 P. (2d) 460, and cases cited.

[fol. 465] The demurrer admitted (among other things) that the Federal power commission, in its order of November 28, 1951, had made sixty-six findings of fact, including No. 53 and No. 59, reading as follows:

> "The Applicant is a municipal corporation; it has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project; and it is a municipality within the meaning of Section 3(7) of the Act.
>
> "Under present circumstances and conditions and upon the terms and conditions hereinafter included in the license, the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes."

Appellant alleged in its original complaint that ordinance No. 14386, in which it adopted the plan and system therein described and designated as the Cowlitz power

development, provided for the acquisition of certain lands by purchase or condemnation. The lands which were to be affected by the project were described in the complaint as follows:

> "Acquisition by purchase, condemnation, or otherwise of 16,000 acres of land, more or less, for dam sites, powerhouse sites, *reservoirs and storage basin sites*, operator's villages, tunnels, construction offices; fishways, fish hatcheries and other fish facilities, gravel pits, roads, bridges and necessary right of ways, said lands being located in
>
> "Sections 1, 2, 3, 9, 10, 11, 16, 19, 20, 21, 27, 28, 29 and 30 of Township 12 North, Range 2 East of Willamette Meridian; Sections 25, 26, 34 and 35 of Township 13 North, Range 2 East, W. M.; Sections 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23 and 24 of Township 12 North, Range 3 East, W. M.; Sections 7, 18, 19, 20, 27, 28, 29, 30, 32, 33, 34, 35 and 36 of Township 12 North, Range 4 East, W. M.; Sections 1, 2, 3, 4, 11 and 12 of Township 11 North, Range 4 East, W. M.; Sections 28, 29, 30, 31, 32, 33 and 34 of Township 12 North, Range 5 East, W. M.; and Sections 2, 3, 4, 5 and 6 of Township 11 North, Range 5 East, W. M.; all of said lands being located in Lewis County of the State of Washington,
>
> *also acquisition of right of ways for relocation of those portions of state*, county and private roads and *highways*, and telephone and power lines *inundated by storage water impounded behind said dams;* acquisition of right of ways for such spur railroad tracks or access roads as may be required to be extended from the closest feasible point on available railroads or public highways to a point at or near said dam sites; *acquisition of such fish hatchery sites and water rights as may be required by the Federal Power Commission;* . . ." (Italics mine.)

[fol. 466] From this legal description (contained in the original complaint) of the lands to be taken, damaged, or inundated by the reservoirs and storage basin sites, which

included state lands devoted to public uses, respondents were charged with notice of the nature and extent of appellant's proposed condemnation proceedings.

Respondents state in their brief that:

" . . . Also there is no reference in the remotest sense in the city's original complaint that any state land either previously dedicated to public use, or not, is to be taken. . . ."

I cannot agree with this statement. Under the allegations of the original complaint, respondents were as well able in 1952 to ascertain the nature and ownership of the land sought to be damaged or to be taken by appellant as they were in 1955, when they first asserted this contention in the instant case in their answer and affirmative defense.

Respondents could have and should have raised, by demurrer or otherwise, when this case was first instituted, the question as to the power of appellant to condemn state lands devoted to a public use. Not having done so, respondents should be precluded from litigating that question in the present case. A pertinent application of the law of the case doctrine is found in the case of *Smith* v. *Seattle*, 20 Wash. 613, 56 Pac. 389, and the following portion of that decision is directly in point:

> "Respondent urges as a preliminary consideration, that the complaint does not state a cause of action, but we think it cannot be permitted to urge the point. This cause was here on a former appeal by the plaintiff from an order of the lower court which sustained a general demurrer to the complaint. (See *Smith* v. *Seattle*, 18 Wash. 484, 51 Pac. 1057, 63 Am. St. Rep. 910, for a full statement of the case.) That order was reversed, this court concluding that the complaint was sufficient. It is true that the ground upon which the respondent now seeks to attack the complaint was not presented on the former appeal, and, inasmuch as the point was not presented nor passed upon at that time, counsel for the city insist that they have a right to urge it now. While it is true that the point was not raised on the former appeal, it is patent that it might have been, and we think it would be a bad and unwarranted practice to permit the point to be urged

now. In support of its general demurrer, respondent was entitled to urge the insufficiency of the complaint from any standpoint, and must be held to have waived [fol. 467] every point not presented at the former hearing. Any other practice would result in cases coming here piecemeal, delaying litigation, increasing the expense to parties litigant and burdening the court with unnecessary labor. It would be productive of much mischief and cannot be tolerated. . . ."

The rule is that questions which have been determined on a prior appeal, or which might have been determined had they been presented, will not be considered by the appellate court upon a second appeal of the same action. *Buob* v. *Feenaughty Machinery Co.*, 4 Wn. (2d) 276, 103 P. (2d) 325, and cases cited; *Gray* v. *Wikstrom Motors, Inc.*, 18 Wn. (2d) 795, 140 P. (2d) 497.

It is also clear that the question of the plenary power of the legislature over municipal corporations was directly in issue in *Tacoma* v. *Taxpayers*, *supra*. Judge Hamley, in his dissenting opinion, made the same argument which the majority relies upon in the case at bar, as follows:

" . . . The Federal government may not confer corporate powers upon local units of government, and the Federal power act does not purport to do so. The supersedure, if any, with respect to the exertion of police power, does not affect applicability of chapter 9 as an exercise of the other power named, for, in my view, the legislature would have intended the act to remain in force in the latter regard had the matter of supersedure been called to its attention.

"That the legislature may restrict the powers of municipalities, is beyond question. Cities are limited governmental arms of the state. *Russell* v. *Grandview*, 39 Wn. (2d) 551, 236 P. (2d) 1061. They may exercise only those powers which are granted to them in the state constitution or statutes. Except as limited by the constitution, legislative control over municipalities is therefore plenary. *State* v. *Aberdeen*, 34 Wash. 61, 74 Pac. 1022; *Wheeler School Dist.* v. *Hawley*, 18 Wn. (2d) 37, 137 P. (2d) 1010. It follows that the legisla-

ture may enlarge or diminish powers already granted to such subordinate units of government. *State ex rel. Nat. Bank of Tacoma* v. *Tacoma,* 97 Wash. 190, 166 Pac. 66. . . ."

Cross-appellants and the state advance substantially the same arguments as respondents relative to the law of the case, and therefore, without further discussion of that point, it is my opinion that these parties are bound by that doctrine for the reasons above stated. The state's further contention that it was not then a party in *Tacoma* v. *Taxpayers, supra,* and therefore not bound by the law [fol. 468] of the case, is untenable, for the reasons hereinafter stated on the question of *res judicata.*

Turning now to my second reason for dissenting, to wit, that cross-appellants and the state are bound by the doctrine of *res judicata,* I wish to refer to certain undisputed facts shown in the record.

Appellant pleaded in its reply that the decision of the court of appeals for the ninth circuit in *State of Washington Department of Game et al.* v. *Federal Power Commission, supra,* was a bar to the position now taken by cross-appellants and the state in this court.

In 1948, appellant filed its declaration of intention to construct the Cowlitz project and followed this with its application to the Federal power commission for a license under the Federal power act (16 U.S.C.A., §791 *et seq.*). As required by the act, notice was served upon the state, in response to which the attorney general filed a petition to intervene upon behalf of the departments of fish and game of the state of Washington. The petition alleged that the state of Washington was a sovereign state of the United States, and that the state of Washington department of game and state of Washington department of fisheries were each a department and subdivision thereof, charged with the duty of enforcing its laws, rules, and regulations relative to the conservation of food fish and game fish. The petition contained this allegation in paragraph nine:

"That the reservoirs which would be created by the proposed dams would inundate a valuable and ir-

> replacable fish hatchery owned by the State of Washington, as well as much productive spawning areas."

In addition, there was a petition for intervention filed on behalf of Washington State Sportsmen's Council, Inc., a [fol. 469] nonprofit corporation, in opposition to the granting of a license to appellant. This petition contained an allegation identical to that last above quoted. Appellant's answer to this petition admitted the allegation. Both petitions for intervention were allowed.

Upon the issues thus framed, hearings were thereafter held before a presiding examiner of the Federal power commission, which consumed twenty-four days. An assistant attorney general, designated by his superior for the purpose, participated in these hearings and vigorously opposed appellant's application for a license. The attorney for the Sportsmen's Council did likewise.

During the proceedings, the assistant attorney general called Robert Meigs, assistant chief of the fish management division for the Washington state department of game, to testify on behalf of interveners. His testimony was, in part, as follows:

> "Q. Now, does the State of Washington Game Department have a hatchery on the Cowlitz watershed? A. Yes, we have what we refer to as the Mossyrock Hatchery, which is located a short distance from Mossyrock, Washington. [3348] Q. Is it within the area that would be inundated by these dams? A. According to information furnished us by Tacoma, the flood line from the Mayfield reservoir would extend some 400 feet past the hatchery and would flood it out. Mr. Mason: You mean 400 feet vertically or horizontally? The Witness: That I don't recall. I don't think vertically; horizontally."

Thus the proposed inundation of the Mossyrock Hatchery, owned and operated by the state of Washington, was not only admitted in the pleadings but was proven by undisputed evidence. Furthermore, it is indisputable that the flooding of the state's hatchery was an obvious part of the comprehensive scheme of the development of the Cowlitz

river, which appellant was asking the power commission to approve in granting the city the license for which it was applying.

At the conclusion of the hearings, the presiding examiner recommended against issuance of the license. Appellant filed exceptions, and the matter was argued orally by all parties before the commission.

[fol. 470] Thereafter, the Federal power commission made findings of fact, rendered an opinion, and issued the license to appellant.

Interveners filed a petition for rehearing before the commission, which was denied January 24, 1952.

On March 12, 1952, the state departments of game and fisheries *et al.* filed, in the United States court of appeals for the ninth circuit, a petition for review of the orders of the Federal power commission. The printed record in that case comprises 4,392 pages. One of the principal points relied upon by petitioners for annulment of commission's order was stated in the petition for review, as follows:

> "Finding No. 53 by the Commission is not supported by substantial evidence and is contrary to Section 9(b) and 27 of the Federal Power Act in that Applicant has not complied with the Water Code of the State of Washington as required by said sections."

After setting forth the pertinent findings of the Commission, and following a discussion of *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U. S. 152, 90 L. Ed. 1143, 66 S. Ct. 906, the court of appeals answered this contention as follows:

> "The Commission in our case acted within the scope of its discretion in not requiring Tacoma to show compliance with the laws of the State of Washington regulating the construction of dams in Washington, because compliance with those laws would have prevented the development of the Cowlitz Project; and in the opinion of the Commission of the Cowlitz Project was 'best adapted to a comprehensive plan' for the development of a concededly navigable stream. The Federal Government's Constitutional authority to regulate commerce and navigation includes the

'power to control the erection of structures in navigable waters', United States v. Appalachian Power Co., 1940, 311 U. S. 377, 405, 61 S. Ct. 291, 298, 85 L. Ed. 243. The Federal Government's power over navigable waters is superior to that of the state. McCready v. Virginia, 1876, 94 U. S. 391, 24 L. Ed. 248.

"The objectors further contend that Tacoma, as a creature of the State of Washington, cannot act in opposition to the policy of the State or in derogation of its laws.

"Again, we turn to the First Iowa case, supra. There, too, the applicant for a federal license was a creature of the state and the chief opposition came from the state itself. Yet, the Supreme Court permitted the applicant to act inconsistently with the declared policy of its creator, and to prevail in obtaining a license. [fol. 471] "Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States. However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them." *State of Washington Department of Game et al.* v. *Federal Power Commission,* 207 F. (2d) 391.

In the last paragraph above quoted, the court of appeals implied that there might be a question of municipal indebtedness limitation or some other related question involved, and cited the case of *Tacoma* v. *Taxpayers, supra,* then pending in this court. No such question was raised in that case on the first appeal or subsequently.

The state laws which the court of appeals held were not a bar to construction of the Cowlitz project were the same

laws passed upon by this court in *Tacoma* v. *Taxpayers, supra, viz.*, the Columbia river fish sanctuary act and the fisheries code.

The court of appeals declined to overturn *any* of the commission's findings which were attacked by the petitioners. The court found that these findings (including Nos. 53 and 59, above quoted) were supported by substantial evidence and declined to interfere with the commission's order granting the license to the city of Tacoma.

The petitioners' petition for certiorari to the United States supreme court was denied on April 5, 1954. *Washington Department of Game et al.* v. *Federal Power Commission et al.*, 347 U. S. 936, 98 L. Ed. 1087, 74 S. Ct. 626.

Cross-appellants and the state now vigorously attempt to avoid the effect of the two prior appeals in this litigation. They state in their brief:

> " . . . We will, however, limit our remarks to the state of the pleadings after August 8, 1955, since this was the date on which the court, in the proper exercise of its discretion, granted the City's request to file an amended complaint and also permitted the *State of Washington in its sovereign capacity* to be added as a party defendant. At this point, with respect to the state of the pleadings, *this was a fresh lawsuit,* and we believe any discussion of former pleadings would be immaterial. . . ." (Italics mine.)

[fol. 472] The only purpose in filing appellant's amended complaint was to incorporate an allegation that appellant's license had been amended to grant appellant a two-year extension of time within which to commence construction of the Cowlitz project, and to incorporate two minor amendments of ordinance No. 14386. There was no material change in the pleadings.

The real crux of the argument advanced seems to be that, by adding the "Sovereign State of Washington" as a party in the present case, it became a new and independent lawsuit. This position cannot be sustained.

In *State* v. *Pacific Tel. & Tel. Co.*, 9 Wn. (2d) 11, 113 P. (2d) 542, the state of Washington attempted to maintain a suit to recover the state compensating or use tax

on goods purchased outside this state by defendant. In a previous suit, defendant had obtained a judgment enjoining collection of the tax by the tax commissioners of the state of Washington. (*Pacific Tel. & Tel. Co.* v. *Henneford,* 195 Wash. 553, 81 P. (2d) 786.) On appeal, this court held that the tax was an unlawful burden on interstate commerce. The question presented in the second case was whether the first suit was *res judicata,* and this question depended upon whether or not the state of Washington was actually a party in the first suit, even though that suit had been maintained against the tax commissioners. The court stated:

> " . . . The general rule is that a judgment for or against the state or an officer or agency thereof in matters as to which such officer or agency is entitled to represent the state in litigation, is conclusive for or against the state."

After discussing the pertinent statutes, the court concluded that the tax commissioners were authorized to represent the state in collection of the use tax, and that the judgment in the prior action was *res judicata* as against the state in the second action.

[fol. 473] In the case at bar, the director of fisheries and the director of game are charged with the duty of enforcing the rules and regulations of their respective departments relative to the conservation and preservation of food fish and of game fish. See RCW 75.08.080 and RCW 77.04.080.

Further powers and duties of the director of fisheries are as follows: He has authority to enter into agreements with the department of defense relative to co-ordinating and correlating the control of fishing in the waters of the state, over which the department of defense has assumed control (RCW 57.08.025); the power to establish and maintain state fish hatcheries, rearing stations, eyeing stations, brood ponds and other facilities as in his judgment may be necessary for the exercise of his powers (RCW 75.08.030); the authority to accept money from municipalities, or other governmental units, in settlement of any claim for damages to food fish resources, and he is by statute designated the agent of the state to accept and

receive all such funds and deposit them with the state treasurer (RCW 75.16.050). The director of game has similar powers conferred upon him by statute (RCW 77.12.200, 77.12.210, 77.12.220).

Under authority of these statutes, I am of the opinion that the directors of fisheries and of game, as agents of the state, are vitally interested in the continued existence of the Mossyrock hatchery. Their interest therein is not personal, nor is it an interest different from that of the sovereign state. The departments of fisheries and of game are but limited subdivisions of the state itself. They do not exist as entities *sui juris,* as does, for example, the state power commission. Therefore, the Mossyrock hatchery, which is concededly owned by the state, is under the jurisdiction of the departments of fisheries and of game, but they exercise control over it merely as agents of the state.

[fol. 474] The directors of fisheries and of game were, therefore, properly joined as parties to the proceedings herein, and, under the rule announced in *State* v. *Pacific Tel. & Tel. Co., supra,* it was their duty to represent the state. I conclude that the litigation in this court, as well as in *State of Washington Department of Game et al.* v. *Federal Power Commission, supra,* has at all times been an action against the state.

There is another basis for my conclusion that the state has been represented at all times in this action. The attorney general designated certain of his assistants to represent the departments of fisheries and of game in this litigation, in accordance with the following pertinent statutes.

RCW 43.10.030, defining the powers and duties of the attorney general, provides that he shall:

> "(1) Appear for and represent the state before the courts in all cases in which the state is interested;
>
> "(2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer;

"(3) Defend all actions and proceedings against any state officer in his official capacity, in any of the courts of this state or the United States; . . .

"(5) Consult with and advise the governor, members of the legislature and other state officers, and when requested, give written opinions upon all constitutional or legal questions relating to the duties of such officers; . . ."

Under RCW 43.10.040, it is further provided that:

"The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions, except those declared by law to be the duty of the prosecuting attorney of any county."

Under the authority of these statutes, the state of Washington was represented by its attorney general, both before the commission and the court of appeals.

"The Attorney General for the State appointed a special assistant attorney general to represent all persons not otherwise represented whose views were in conflict with the State Departments of Game and Fisheries. Thus, the State of Washington by its Attorney General, and the people of Washington holding [fol. 475] views not in harmony with the State's official position, and the applicant City of Tacoma were represented at the hearing which was had before an Examiner." *State of Washington Dept. of Game* v. *Federal Power Commission,* 207 F. (2d) 391, 393.

He could and should have raised, before the Federal power commission, and the court of appeals, the objection that appellant did not have statutory authority to condemn state lands devoted to public uses.

It is the purpose of the law that where issues have once been litigated and decided, the litigation shall then be at an end.

Where a party has had a full opportunity to present all the defenses at his command, and fails to do so, the doctrine of *res judicata* applies. *Symington* v. *Hudson,* 40 Wn. (2d) 331, 243 P. (2d) 484.

This doctrine was applied by the supreme court of the United States in *Commissioner of Internal Revenue* v. *Sunnen,* 333 U. S. 591, 92 L. Ed. 898, 68 S. Ct. 715, where it was said:

> "It is first necessary to understand something of the recognized meaning and scope of *res judicata,* a doctrine judicial in origin. The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell* v. *County of Sac,* 94 U. S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, 'Res Judicata,' 38 Yale L. J. 299; Restatement of the Law of Judgments, §§47, 48."

The rule above stated is directly applicable in this case. In *State of Washington Department of Game et al.* v. *Federal Power Commission, supra,* the pleadings admitted, and the proof established, that the Mossyrock hatchery would be inundated, and, of necessity, taken by condemnation proceedings. The final judgment entered in that case is, therefore, binding upon cross-appellants and the state

as to the issue of condemnation, which they now contend is before this court for the first time.

[fol. 476] Neither the entry of new counsel into the case nor the addition of a sovereign state as a party defendant, after its duly appointed representatives had lost the case, changes the character of the lawsuit. I am of the opinion that the decision of the court of appeals for the ninth circuit, in the case of *State of Washington Department of Game et al.* v. *Federal Power Commission, supra,* is *res judicata* as against both cross-appellants and the state.

Assuming *arguendo* that neither the doctrine of the law of the case nor the doctrine of *res judicata* applies to the facts before us, then my third reason for dissenting is that the majority has misconstrued the Federal power act and has failed to give it the supremacy over state laws which should be accorded it under the commerce clause of the United States constitution.

I am entirely in agreement with the majority in its statement of the general rule that a municipality is a creature of the legislature, and that its powers (including that of eminent domain) are derived from the legislature or the constitution. It has no power of eminent domain except as granted by the legislature. But, in this case (as stated on the first appeal), the power of Congress, under the commerce clause, is superior to that of the state when Congress exercises its power as it did in enacting the Federal power act.

The two principal decisions of the United States supreme court construing the power act and its supremacy under the commerce clause were discussed in this court's opinion on the first appeal. They are *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. Ed. 243, 61 S. Ct. 291, and *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U. S. 152, 90 L. Ed. 1143, 66 S. Ct. 906. These two decisions will herein be referred to as the *Appalachian* case and the *First Iowa* case, respectively.

[fol. 477] Bearing in mind the holding in these two cases that Congress has plenary power over navigable waters, and that it may deny, or grant, on such terms as it sees fit, the privilege of constructing dams therein, I wish to invite attention to certain provisions of the Federal power act (41 Stat. 1063).

In section 4(e) (16 U.S.C.A. §797), the Federal power commission (herein referred to as the commission) was authorized to issue licenses for the construction of dams and appurtenances to certain entities, including "any state or municipality." In the preceding section 3, Congress defined the term "municipality" as follows:

> "'municipality' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power; . . ."

Under section 6 (16 U.S.C.A. §799), the commission may issue such licenses for a period not exceeding fifty years which may be conditioned upon the acceptance by the licensee of certain terms and conditions stated in the act and of any others that may be prescribed by the commission pursuant thereto.

Section 9 (U.S.C.A. §802) provides:

> "Each applicant for a license under this chapter shall submit to the commission—
>
> "(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.
>
> "(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

"(c) Such additional information as the commission may require."

[fol. 478] Section 10 (16 U.S.C.A. §803) prescribes certain conditions on which all licenses shall be issued. Subdivision (a) thereof reads as follows:

"That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

By section 14 (16 U.S.C.A. §807), the United States is granted an option to purchase any project upon or after the expiration of the license upon payment of the net investment of the licensee if the purchase price be not mutually agreed upon by the parties. The term "net investment" is defined in section 3 of the act (16 U.S.C.A. §796).

Licensees are granted the power of eminent domain in section 21 (16 U.S.C.A. §814) in the following language:

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of

> the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated; *Provided,* That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000."

Without further reviewing the provisions of the Federal power act, it is apparent that Congress intended to and did exercise its full power under the commerce clause in providing for the licensing of the projects described there- [fol. 479] in. When the power commission has made a finding as required by section 9(b) that the licensee has complied with state laws with respect to the right to engage in the business of developing, transmitting, and distributing electric power and any other business necessary to effect the purposes of the licensee under the act, then the licensee becomes the agent of the Federal government in regard to the project. Upon the issuance of the license, all rights and obligations of the licensee are derived from congressional constitutional powers, and not those of the state where the project is located. See *First Iowa* case.

The project for which the license is issued is a Federal project and is to be considered as if it were to be constructed and operated by the government itself. The government has an option to buy the project works at the end of the license period, as provided in section 14 of the act. Every detail of the project must be carried out by the licensee in strict accordance with the terms of the license and the maps and drawings identified therein. The comprehensive plan adopted by the power commission for the development of the waterway may not be deviated from by a licensee without permission of the commission.

The licensee derives the power of eminent domain from §21 of the act (quoted above). Long before the passage of the act, Congress, in 1906 (34 Stat. 462), enacted a special

act authorizing the city of St. Louis to construct a bridge across the Mississippi river in accordance with the general bridge act. With respect to the exercise of the power of eminent domain, section 2 of the special act provided:

> "That for the purpose of carrying into effect the objects of this Act, the city of Saint Louis may receive, purchase, and also acquire by lawful appropriation and condemnation in the States of Illinois and Missouri, upon making proper compensation, to be ascertained according to the laws of the State within [fol. 480] which the same is located, real and personal property and rights of property, and may make any and every use of the same necessary and proper for the construction, maintenance, and operation of said bridge and approaches consistent with the laws of the United States and of said States respectively."

The authority of St. Louis to condemn lands for bridge approaches in Illinois was challenged. In *Latinette* v. *City of St. Louis,* 201 Fed. 676, the circuit court of appeals (7th cir.) disposed of this challenge by saying:

> "Only consent was given by section 1 of this latter act to build the bridge in the manner and on the conditions expressed in the general bridge statute. Authority to exercise the sovereign power of appropriation, if given at all, was conferred in section 2. Appellant's contention is that the words 'according to the laws of the state' show that Congress meant that St. Louis should not have power to condemn except by virtue of state law, and that, inasmuch as Illinois refuses to give St. Louis the power, the judgment must be reversed. But, looking to the construction of the sentence, it seems clear to us that only the 'compensation' is 'to be ascertained according to the laws of the state.' Furthermore, while Congress might tell its agent to go to the state law for the rules of practice, *it could not constitutionally effect anything by telling its agent to go to the state law for power to condemn land for a national purpose.* Condemnation is an attribute of sovereignty. It must be exercised directly by the

sovereign or through an agency appointed by the sovereign. Neither the power nor the selection of agents can be transferred to another. States have the power only for state purposes; the nation, only for national purposes. *So, the power to condemn mentioned in section 2 must be referred to the national power.* And finally, Congress in framing section 2 used a formula of expression which had already been judicially construed. In Luxton v. North River Bridge Co., 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808, the act provided that the bridge company might 'acquire by lawful appropriation and condemnation, upon making proper compensation therefor, to be ascertained according to the laws of the state within which the same is located, real and personal property and rights of property'; and these words, the same as in the case at bar, were held to relate to the national power.

"... *Contention is therefore narrowed to this: That Congress could not constitutionally select appellee as the agency through which a national power should be exercised. Nothing in the Constitution forbids the selection of a state corporation as a national agent. In reason the material thing is the principal's authority, not the parentage or birthplace of the agent.* And the decisions of Mr. Justice Bradley at circuit in Stockton v. B. & N. Rld. Co. (C.C.) 32 Fed. 9, and of the Supreme Court in Cherokee Nation v. Kansas Ry. Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295, explicitly cover the point." (Italics mine.)

Another case which does involve the right of a licensee under the act to exercise the power of eminent domain is *State of Missouri ex rel. Camden County* v. *Union Electric* [fol. 481] *Light & Power Co.*, 42 F. (2d) 692. There, a private utility corporation had received a license from the power commission to build a dam for the purpose of producing hydroelectric power. The plan contemplated a dam which

"... would inevitably create an immense reservoir and cause the inundation of vast tracts and bodies of land, the submergence of many public highways and

school districts, and the permanent overflow of the village of Linn Creek in Camden county, which is now the county seat of said county; and that the courthouse and other public property situated in said Linn Creek would be flooded and rendered useless."

The state of Missouri brought an action in the United States district court to enjoin the construction of the proposed dam. After discussing the power of Congress under the commerce clause and the effect of the Federal water power act of 1920 (prior to the 1935 amendment), the court considered section 21, relating to the power of eminent domain as it related to property already devoted to a public use. After quoting section 21, the court said:

"The licensee has been granted the power to acquire property by the exercise of eminent domain in express terms. Concededly this right may be exercised as against private property.

"'Public lands,' as used in the act, refers only to lands owned by the United States. The only question, therefore, that is here presented is whether the right of eminent domain may be exercised against property already dedicated to a public use when situated within the proposed reservoir and to be affected by the improvement.

"While it is well settled that the Legislature may authorize the taking of property already devoted to a public use, it is equally well established that a general delegation of the power of eminent domain does not authorize the taking of property already devoted to a public use, *'unless it can clearly be inferred from the nature of the improvements authorized or from the impracticability of constructing them without encroaching upon such property that the legislature intended to authorize such a taking.'* 10 R.C.L. §169; Western Union Telegraph Co. v. Pennsylvania R. R. Co. et al., 195 U. S. 540, 25 S. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517. In this connection it cannot be questioned but that the Congress had the power to confer the right of eminent domain upon the defendant Union Electric Light & Power Company. 10 R.C.L. §167.

"In the instant case the Congress must have contemplated this identical situation; hence the requirement of notice. Moreover, the proposed improvements could not be accomplished, except through the exercise, if necessary, of eminent domain against property already dedicated to public use. *To deny the right of eminent domain as against this public property would not only defeat the functions of the national govern-* [fol. 482] *ment, but would run contrary to the obvious intent of the Congress as expressed in the Water Power Act.* Stockton, Attorney General, v. Baltimore & New York R.R. Co. (C.C.) 32 F. 9; 20 C. J. §90, P. 602; Vermont Hydro-Electric Corporation v. Dunn et al., 95 Vt. 144, 112 A. 223, 12 A.L.R. 1495; Imperial Irrigation Co. v. Jayne, 104 Tex. 395, 138 S. W. 575, Ann. Cas. 1914B, 322.

"It is not within the judicial power to question the purpose for which property is to be taken under the power of eminent domain. The necessity for the taking is not a judicial question, but is exclusively within the power of Congress and one which it may determine by direct enactment or by delegating the power to some officer or board. Kaw Valley Drainage District of Wyandotte County, Kansas, et al. v. Metropolitan Water Co. (C.C.A.) 186 F. 315." (Last italics mine.)

The state's prayer for an injunction to prevent the flooding of the public property within the proposed reservoir was denied.

The majority opinion holds that the state of Washington may now, at this late date, appear in this declaratory judgment action and obtain a declaration that appellant may not condemn the right to flood the Mossyrock Hatchery because the legislature has not authorized such a proceeding.

In my opinion, the assertion comes too late, because the power commission, in a proceeding before it (to which the state was a party), found (finding No. 53) that appellant had authority under state law to do everything necessary to carry out the provisions of the license granted it. The record showed that the acquisition of the right to flood this

state-owned hatchery was an essential part of the comprehensive plan for the development of the Cowlitz river, which the power commission had approved and for which the license was issued to appellant. As previously stated, the state's challenge of this finding was overruled by the court of appeals for the ninth circuit (207 F. (2d) 391). To uphold the state's contention in the present case is to overrule the decision of a Federal court in a matter over which it had jurisdiction. It seems to me that considerations of comity forbid our doing so.

[fol. 483] But the most serious error in the majority opinion (as I see it) is the disregard of the constitutional separation of state and Federal powers as recognized by the supreme court's decisions in the *Appalachian* and *First Iowa* cases. It would extend this opinion beyond all permissible limits to review those decisions in detail. The supreme court plainly held that the power commission had sole jurisdiction to determine whether a licensee had authority under state laws to carry out the terms of its license. This holding is emphasized by the dissenting opinion of Justice Frankfurter, who did not disagree with the court's interpretation of the Federal power act nor the constitutional power of Congress to enact it. He felt that under section 9(b) the power commission should not make a finding regarding state laws until the state courts had interpreted them. This is clear from the following portion of his dissenting opinion:

> " . . . By §9(b) of the Act, 41 Stat. 1063, 1068; 16 U.S.C. §802(b), Congress explicitly required that before the Commission can issue a license for the construction of a hydro-electric development, such as the proposed project of the petitioner, the Commission must have 'satisfactory evidence that the applicant has complied with the requirements of the laws of the State' in reference to the matters enumerated.
>
> "Whether the Commission has such 'satisfactory evidence' necessarily depends upon what the requirements of State law are. In turn, what the requirements of State law are often depends upon the appropriate but unsettled construction of State law. And so, the Commission may well be confronted, as it was in this case,

with the necessity of determining what the State law requires before it can determine whether the applicant has satisfied it, and, therefore, whether the condition for exercising the Commission's power has been fulfilled.

"To safeguard the interests of the States thus protected by §9(b), Congress has directed that notice be given to the State when an application has been filed for a license, the granting of which may especially affect a State. Section 4(f), 49 Stat. 838, 841; 16 U.S.C. §797(f). *If a State does not challenge the claim of an applicant, the evidence submitted by the applicant, if found to be satisfactory by the Commission, has met the demands of §9(b), and a State cannot thereafter challenge the Commission's determination. . . .*" (Italics mine.)

The majority of that court in the *First Iowa* case did not indicate any disagreement with the italicized portion of the dissent quoted. The majority were of the view that the [fol. 484] commission could make findings under section 9(b) in the absence of state court decisions interpreting state statutes. We are, of course, bound by the majority decision.

To hold otherwise is to permit the state of Washington to exercise a veto as to the project involved in the case before us by saying that the power commission was wrong in finding that the city of Tacoma had authority under state law to construct these dams, because the city has no authority to condemn the right to flood the state's fish hatchery. Under the decision in the *First Iowa* case, the power commission has exclusive jurisdiction to make a finding whether a licensee has authority under state law *to engage in the power business* (§9(b)). The power commission has made that finding (the circuit court refused to set aside the finding), so that factual issue was permanently and effectively settled.

The Federal power act in section 21 affords a licensee ample authority as an agent of the Federal government to exercise the power of eminent domain without state authority. A state may not deny or impair this authority once a license has been issued.

The majority opinion concludes with the following statement of its decision on the constitutional question presented:

> "In the instant case, the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition;* it presents a question of *lack of state statutory power* in the city. It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the state of Washington.
>
> "The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal power act, as we read it, does not purport to do so.
>
> "If it be held that the Federal government may endow a state-created municipality with powers greater than those given it by its creator, the state legislature, a momentous and novel theory of constitutional government has been evolved that will eventually relegate a sovereign state to a position of impotence never contemplated by the framers of our constitutions, state and Federal."

However much I might agree with the majority's state-
[fol. 485] ment in the last paragraph above quoted as to the effect of such a holding on the powers of a sovereign state, several decisions of the United States supreme court rendered in the past twenty-five years construing the commerce clause (in addition to the *Appalachian* and *First Iowa* cases) compel my dissent from the majority holding as stated in the first two paragraphs of the quotation.

An excellent discussion of these decisions is found in the January, 1957 issue of the American Bar Association Journal (Vol. 43, p. 55) under the subheading "The Commerce Clause—Then and Now." Among the decisions cited therein are: *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615 (upholding the validity of the Wagner Act under the commerce clause); *United States* v. *Darby,* 312 U. S. 100, 85 L. Ed. 609, 61 S. Ct. 451 (upholding the validity of the

fair labor standards act under the commerce clause); *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162 (holding that the insurance business may be regulated by Congress under the commerce clause).

Other examples of acts of Congress, based upon the commerce clause and having a similar effect upon the powers of the states, which have been held valid by the Federal courts are: Securities act of 1933, declared constitutional in *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654; Securities exchange act of 1934, declared constitutional in *Wright* v. *Securities and Exchange Commission*, 112 F. (2d) 89, (C.C.A. 1940).

Whatever views one may entertain regarding the effect of these decisions upon powers of the sovereign states, the supreme court remains the final authority on the constitutionality and interpretation of these acts of Congress as well as of the Federal power act. Under Art. VI of the United States constitution, the laws of the United States [fol. 486] made in pursuance thereof are declared to be the supreme law of the land, binding on state judges regardless of any state laws or constitutional provisions to the contrary.

Therefore, deeming myself bound by the decisions of the supreme court in the *Appalachian* and *First Iowa* cases, interpreting the Federal power act, I am impelled to dissent from the opinion of the majority in this case.

Without further extending my views, I deem it sufficient to state that, in my opinion, appellant's amended complaint states a cause of action, and that the several answers and cross-complaints herein have not raised a valid defense, for the reasons heretofore given.

My conclusion is that appellant has a valid license issued by the Federal power commission for construction of the Cowlitz project, and that the utility bonds authorized by ordinance No. 14386, as amended, have not been shown to be invalid in any respect.

I would dispose of this case as follows:

The portion of the judgment from which the cross-appeal is taken should be affirmed. On appellant's appeal, the

judgment of the trial court should be set aside, and the cause remanded to the superior court with directions to enter a declaratory judgment for appellant in conformity with the views expressed herein. The injunction *pendente lite,* heretofore continued in effect by order of this court, should be dissolved.

Donworth, J.

We concur with Donworth, J., Mallery, J., Finley, J.

[fol. 487] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

APPELLANT'S PETITION FOR REHEARING—Filed March 8, 1957

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[fol. 491] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR REHEARING

The Appellant, City of Tacoma, respectfully requests rehearing, reconsideration, and clarification of the decision of the Court filed herein on February 7, 1957.

It appears from Chief Justice Hill's five-line concurring opinion that the majority opinion was rather quickly and belatedly prepared and circulated. Especially is this true in view of the length and complicacy of the record, the shifting positions of Respondents, the scope of the briefs, and what the Court calls the "hydra-headed" nature of this case.

Frankly, the majority opinion appears both incomplete and unclear. It is extremely difficult of interpretation. Reconsideration, extension and clarification thereof seems clearly in order.

1. *Decision Discusses But One Matter*

Appellant made fifteen assignments of error. *The majority opinion discusses none thereof.* Yet it purports to *affirm* the judgment appealed from. We believe this extremely unusual. It *disagrees* with the trial court's declaration on the one point discussed on cross-appeal, yet also purports to *affirm* this declaration.

The judgment appealed from is composed of six paragraphs, each dealing with a separate subject matter and making a declaration thereon, and from four of which [fol. 492] appeals were taken. In addition, Appellant assigned error in the entry of two restraining orders and an injunction *pendente lite*, in the admission of the State as an added party, and in the appointment of new attorneys for the taxpayers to serve at the City's expense.

2. *Many Questions Left Unanswered*

The opinion discusses only the first of the six paragraphs. It leaves wholly undiscussed and unanswered the questions of fish damage (para. 2), interference with navigation (para. 5), form and scope of the injunction

(para. 6) and the several intermediate orders. *So far as Appellant's appeal is concerned it remains wholly undiscussed and undecided.*

3. *Majority Opinion Overlooks Special Nature of Case*

We think the majority opinion starts with a false premise and ends with a false conclusion. It seems to overlook the fact that this is a *special proceeding to declare and settle the law,* and that a declaration *on all points* is a special characteristic of this kind of proceeding. It treats the action as one for an injunction, and the ultimate inquiry whether the injunction should be sustained.

The project in question is under way and must still be dealt with, and presumably will be built by someone, and the City and others have contractual and property rights in connection therewith. Amicus Curiae and other cities may be confronted with similar problems elsewhere.

It is not proper procedure under the special statute (to test and determine the validity of a proposed bond issue) to answer but one of several questions presented, and to leave the others unresolved. Such a procedure would permit meeting and removing but one obstacle or objection at a time, and leave all others for future litigation, even on the same project.

The majority opinion suggests that the City's inability to acquire the State's property by eminent domain "can be remedied only by State legislation". Suppose this is [fol. 493] done through legislation now or hereafter sought, what then about the claimed interference with navigation? What then about Respondents' Second Assignment of Error concerning fish damage? Do these other portions of the judgment stand affirmed? Were they correct? Are they subject to re-examination? And how do we go about re-examining them? We respectfully submit that a rehearing is necessary in order that these questions may be answered.

4. *No Decision of Navigation Question*

The sole basis of that part of the Trial Court's judgment from which the City appealed was that the proposed

dams (both of them) would "necessarily" impede, obstruct or interfere with public navigation contrary to the provisions of RCW 80.40.010 et seq., and the injunction entered was based solely thereon.

A great part of the records and briefs are devoted to the various phases of this question.

The minority opinion says that the City should prevail, which means that the Trial Court should be reversed on navigation. We assume from Chief Justic (sic) Hill's comment that the majority may have agreed, but neither the majority or minority opinions discuss navigation. This means that the City's appeal on this point is bypassed, and even if it should succeed hereafter in purchasing the fish hatchery through negotiation, or be able to acquire same as a result of remedial legislation, the question of interference with navigation would still remain unresolved, and if the judgment is "affirmed" a bar to the project.

We submit that an answer to this question is essential, and that without it Appellant's appeal is unrecognized.

5. *No Consideration Given to Form and Scope of Judgment*

Even if the City be ultimately held not to have the power of eminent domain against State property already devoted to a public use, it does not follow that the City's proposed project is illegal *in toto*, that everything done in connection therewith is in excess of its powers, and that it should be enjoined from spending *any moneys whatever* [fol. 494] hereafter relating thereto. The judgment should simply declare that the City lacks the power of eminent domain, and at most enjoin the City from taking or interfering with the fish hatchery until it has arranged to purchase same by negotiation or obtained legislation authorizing condemnation thereof.

Neither the majority or minority opinion discuss these questions. We submit that the form and scope of the judgment entered herein are most important and essential in this proceeding, and that without proper determination thereof the decision is incomplete, and will give rise to the greatest of confusion.

6. *Trial Court's Reasons for Eminent Domain Declaration*

Paragraph one of the judgment merely declares that *the question* of the capacity of the City to acquire property of the State by eminent domain is not within the jurisdiction of the Court. Being of this opinion, the trial judge *refrained* from passing upon the question itself. *He assigned six reasons for so doing.* Lack of jurisdiction over an eminent domain proceeding was only one of them. The six reasons as set forth on pages 64-65 of Appellant's Reply Brief, are:

(1) "It probably was the wrong approach to determine what can and what cannot be condemned, before the validity of the bond issue is determined."

(2) "the City must have the authority to issue bonds and raise money before the City can acquire property."

(3) "the impediments that have been so strenuously argued by Counsel in relation to the condemnation matter are practical, or physical impediments, rather than legal impediments."

(4) "there is no legal bar to the construction of the dam simply because there may develop later there is some land which the city cannot obtain the right to flood."

(5) "the court cannot presume that all negotiations will fail for the purchase of property and it is essential to any exercise of eminent domain that reasonable efforts first be made to purchase property by negotiation."

[fol. 495] (6) "in any event this is not the correct court to determine that question."

The majority opinion discusses only the last of these reasons. We submit that the others are important and entitled to consideration too. They constitute the gravamen of Appellant's position. They are especially important

in determining the form and scope of the judgment that should be entered. That judgment should not declare any act which the City has taken to be illegal or in excess of its powers, or the City's proposed bonds to be invalid.

7. Majority Only Incidentally Discusses Trial Court's Reasons.

The majority begins discussion of the eminent domain paragraph of the judgment at page 11 of the decision by setting forth the paragraph *verbatim.* It then says:

> "The City * * * argues that this question is not before us. Two reasons are given: first that the taxpayers of Tacoma * * * are precluded by the law of the case as declared on the first appeal to this court: and second that [* * * the directors and state * * *] are bound by the doctrine of res judicata."

Reference to the trial court's reasons above set forth will show that "law of the case" and *"res judicata"* were not his reasons.

Reference to Appellant's Reply Brief, pages 60-75, will show also that they are not Appellant's "reasons". They are only incidentally mentioned by reference on page 62 in connection with paragraph two (damage to fish). The reasons urged by Appellant in support of the eminent domain ruling are those assigned by the trial court, together with the point that Respondents were without right to cross-complain for injunctive relief in this declaratory proceeding.

[fol. 496] The majority opinion does not discuss Appellant's "reasons". It discusses only the "two reasons" which it selects, and makes no reference to the others.

We ask for rehearing that consideration may be given to the points actually urged by Appellant.

8. Majority Assumes Form and Scope of Judgment

Having thus determined that the trial court was in error in declaring that it was without jurisdiction to determine the eminent domain question, the majority proceeds to

discuss this question, and concludes that the City does not have power under state statutes to condemn the state's property already devoted to a public use, and that it cannot obtain such power from the grant contained in Sec. 21 of the Federal Power Act.

Immediately following this, the majority concludes its opinion with the statement:

> "Therefore, for the reasons we have set forth and discussed herein, the judgment of the superior court is affirmed."

It would seem that the majority must not have meant this. To affirm paragraph one would be contrary to its reasoning. But what it did mean, and how far it intended to go, is not clear. Likewise, if it intended to affirm paragraphs 2, 5 and 6, it would be doing so without discussion or written opinion, contrary to the provisions of Art. IV, Sec. 2 of the State Constitution.

9. *Decision of One Point Only Does Not Properly Decide Case*

It is no answer to say that decision of paragraph one renders decision of the other paragraphs unnecessary. This is not so. The judgment here was not a mere money judgment, nor one in which it is sufficient to merely announce the winner, but, rather, one in w. ich the Court is called upon in the interest of future procedure to settle and declare the law on all points presented.

[fol. 497] 10. *Possible Interpretations of Majority Opinion*

Possible interpretations of the majority opinion appear to be:

(1) The judgment is affirmed *in toto.*

(2) The 1st paragraph is reversed, and all other paragraphs are affirmed.

(3) The 1st paragraph is reversed, a ruling made that the City is presently without power to acquire by

eminent domain the state fish hatchery, that this alone is sufficient to sustain the injunction, and that the other provisions of the judgment are not discussed or passed upon.

Of these interpretations the first is not justified because of the express ruling of error.

The second is not justified because no reasons are given, as required by the State Constitution, for affirmance of the other paragraphs.

If the third interpretation is the one intended, then:

(1) the fifth paragraph dealing with navigation should be ruled out and held erroneous, and

(2) the injunction should be modified to limit its prohibitions to the taking of or interference with the fish hatchery.

The reasons for the above are that there will be no interference with the hatchery until the reservoir area is flooded, and in the meantime, same may be acquired by purchase, or interference therewith avoided by diking, or change of plans (only the Mayfield reservoir is affected), or the City's license may be transferred to others who do have the power of eminent domain, or condemnation may be legalized by legislative action.

[fol. 498] Also under the third interpretation the injunction is inappropriate because *as of its effective date* it would bar the City from further dealing with and protecting its property, and from making payment to contractors and employees for work done prior thereto. The language is so broad as to bar all further expenditures and to throw in doubt those already made.

11. *State Served in Previous Proceedings*

On page 13 the opinion says that the State is not bound by the doctrine of *res judicata* for the reason that it "was not a party to this action at the time our former decision

was rendered," and again on page 15 that "the State became a party to this action on August 8, 1955".

The State of Washington was served with notice of the Federal Power Commission proceedings pursuant to the provisions of 16 U.S.C.A. 797(b), and appeared therein by the Attorney General, and hence was a party thereto. See *Wash. Dept of Game* v. *Federal Power Commission*, 207 F. (2d) 391, 393.

In this case also the Attorney General was served with a copy of the summons and complaint as required by the provisions of RCW 7.24.110 and the decision of this Court in *Parr* v. *Seattle*, 197 Wash. 53, 84 Pac. (2d) 375, and did appear for the two departments.

The State was thus duly served with legal process at the inception of each proceeding and we submit should be bound by the action taken therein.

12. *Taxpayers Exhaust All Defenses and Are Absolved From Further Defense*

On page 3 the opinion, in referring to the taxpayers' first answer and cross-complaint, states that it "affirma- [fol. 499] tively alleged that the city had exceeded its authority under the state statutes". The entire gravament (sic) of this cross-complaint was that the City Council in passing its bond ordinance had acted "arbitrarily and capricously" (sic) in certain claimed respects, all of which involved the exercise of broad legislative discretion (Tr. 71).

On the same page, in referring to the City's petition to terminate further liability for taxpayers' attorneys' fees, the opinion states that the City's petition stated that nothing further remained to be done by the taxpayers "except to establish the allegations of the complaint (if denied) and enter judgment". What the petition stated was that nothing remained to be done, except to establish the allegations of the complaint, "which were admitted", and that this Court had held that the complaint "stated a cause of action".

Further, the prayer of the above petition was not that the taxpayers be denied costs for attorneys' fees, but that

upon determination that the taxpayers had exhausted all proper defenses, the City's liability for *further* taxpayers' attorneys' fees be terminated, and such fees fixed.

On the same page the opinion says, "On the same date, the taxpayers of Tacoma answered". The answer referred to is the taxpayers' answer to the City's petition to terminate further liability for taxpayers' attorneys' fees, and in this answer they admitted that they had exhausted all their defenses and asked the Court's instructions as to further defense.

13. *Orders Terminating Liability for Taxpayers' Attorneys' Fees and Fixing Same Were Final*

On page 4, continuing discussion of the above petition, the majority says that on April 29, 1954, the Court entered an order absolving the taxpayers from any further defense or prosecution of the action. What the majority does not note, however, is that prior to entering this order the Court had sustained the City's demurrer to the taxpayers' [fol. 500] cross-complaint, and in the order of April 29, 1954, found that this Court by its decision upon the prior appeal herein *had determined all the questions and decided all the issues proper for determination herein, and terminated the City's liability for any further costs for taxpayers' attorneys' fees* (Tr. 95-96). Subsequently, by order entered December 27, 1954, these attorneys' fees were fixed and paid (Tr. 102).

It is Appellant's position that the above orders were final and, not being appealed from, are binding. This matter is involved in Appellant's Assignment of Error No. 7, relating to appointment of new taxpayers' attorneys with fees to be taxed against Appellant, discussed on pages 124 to 129, and pages 53 to 58 of Appellant's Opening and Reply Briefs, respectively.

The majority does not mention or discuss this assignment of error, or determine this liability. Obviously, a ruling thereon is called for.

14. *Entry of Restraining Orders and Injunction Pendente Lite Was Error*

On page 5 the opinion refers to *ex parte* entry of the temporary restraining order of June 24, 1955, on page 6 to modification thereof on July 7, 1955, and on page 7 to entry of the injunction *pendente lite* on October 7, 1955. Appellant excepted to all these orders, and made Assignments of Error thereto on this appeal (Assignments of Errors 1, 2 and 3). The majority does not note or discuss these assignments.

Besides the impropriety of the *ex parte* application for and entry of the first order, there never was any basis in fact for entry of any restraining order or injunction *pendente lite* in this cause. *There was no threatened or imminent injury to any of the State's property.* The City did not propose to flood or take any of such property for approximately two years, and then only after it had [fol. 501] legally acquired the right to take or damage same. Under such circumstances there were no grounds for injunction. See cases cited pages 79-80, Appellant's Reply Brief.

We submit that the Trial Court's entry of these orders was erroneous, and that this Court should say so. These orders were of great detriment and cost of (sic) Appellant, and for correction and future guidance this Court should rule thereon, else in the future similar attempts may be made and procedure followed on the basis of what was done and apparently approved here.

In connection with the City's motion to quash and dissolve the *ex parte* temporary restraining order aforesaid, the opinion says at page 5 that the City stated "that the action had been pending for more than two years" and for the past year "had awaited the ruling of the Superior Court upon the City's demurrer to the directors' second amended cross-complaint". In the interest of accuracy the action had at that time been pending for three and a third years, and for the past year had been awaiting the Trial Court's ruling, not on the City's demurrer, but on the fanciful thing called the directors' motion to strike the affirmative defenses contained in the City's Reply to the Directors' Second Amended Cross-Complaint.

15. *Amendments to the Complaint were Purely Technical and Did Not Change or Enlarge Issues*

On page 6 the opinion says "July 27, 1955, the City filed an amended complaint," on page 9 that the case was tried "Upon the City's *amended* complaint", on page 12 that the sole question before this Court on the prior appeal "was whether the City's *first* complaint stated a cause of action", and on page 13 that the case is now before this Court after trial "of issue formed by the City's *amended* complaint" (italics in each case is the Court's emphasis).

The amended complaint was in fact filed August 8, 1955, pursuant to the order of that date. The motion upon which the order was based, as well as the order, recite that the [fol. 502] amended complaint *does not change or enlarge the issues in any way.* It merely attached thereto and referred to therein an amendment to the Federal Power Commission license granting a two year extension of time to commence work, and two ordinances making routine amendments in the terms of the bonds authorized by the bond ordinances. *These amendments merely brought the complaint up to date.* They were made necessary by the very time consumed in this litigation. They in no sense set up a different cause of action or any different issue or made this a new law suit, or destroyed the law of this case.

Any inference that a new cause of action was stated, that might be drawn from the opinion's emphasis of the words "amended" and "first" is unwarranted, and any conclusion of the majority based on this premise is erroneous and should be corrected.

16. *Admission of the State as an Added Party Was Error*

On page 6, the opinion states, "Over the objection of the City, August 8, 1955, the Court entered an order granting permission 'to add the State of Washington as a party defendant herein * * *'".

The City assigned error to entry of this order (Assignment of Error Nos. 4 and 5), but the majority does not discuss same nor rule thereon.

The State's Cross-Complaint later filed was a new and independent cause of action and, even if it was a good one, was not cognizable in this special declaratory judgment proceeding. *Under the decisions of this Court, the operations of the Declaratory Judgment Act are limited to cases where there is no satisfactory remedy at law available.* The State had ample remedy through other statutory or common law actions to protect its property from any interference or invasion. See cases cited pages 69 to 73, Appellant's Opening Brief.

What the Trial Court in effect thus belatedly did was to permit start of a new case by a new party by Cross-[fol. 503] Complaint after an appeal by all other parties to this Court, and after establishment of the law of the case, which the majority now says is not binding on this new party.

What the Court also did was to first add a new party, and then permit it by way of cross-complaint to present a cause of action which only that party could present, and in a Court where it could not normally have presented it.

We ask that the Court consider and pass upon this substantial question of procedure which the majority opinion leaves unfouched. The State, through the Attorney General, was duly served with summons and complaint at the inception of this proceeding. May it await its pleasure to appear in its different capacities, and mess up the proceeding in so doing? These questions are discussed under appropriate headings in our briefs, and we think we are entitled to a ruling thereon.

17. *Only Few Items of State Land Are Devoted to Public Use—Clarification Needed*

On page 7 the opinion refers to "various parcels of state land devoted to public uses" as being described by legal description in the directors' and State's amended answer and cross-complaint. Most of these lands (those described in paragraph 4 of the pretrial stipulation, Tr. 242-248) are merely publicly owned and not devoted to a public use; and, hence, are held in a proprietory capacity, and are subject to the City's power of eminent domain pursuant to

the decision of this Court in *Tacoma* v. *State,* 121 Wash. 148, 209 Pac. 700, or are state and county highways subject to acquisition pursuant to the provisions of RCW 90.28.010.

The decision, we submit, should differentiate between these lands so that there may be no question hereafter as to what the City must purchase and what it may condemn.

[fol. 504] 18. *Appointment of New Taxpayers' Attorneys Was Error*

On page 8 the opinion refers to the order of October 11, 1955, appointing new attorneys for the taxpayers of Tacoma, and recites "The taxpayers, theretofore appointed, had withdrawn from the proceedings and had defaulted within the provisions of the declaratory judgment act." The opinion makes this statement but how it arrives at the conclusion is unexplained.

We submit that upon the record this statement is unwarranted. *There was no thought or semblance of default.* The taxpayers had defended to the last ditch diligently, and been execused (sic) by the Court. The above order was entered over Appellant's objection, and assignment of error is made thereto (Assignment of Error No. 7). Whether the City is liable for additional attorneys' fees as costs herein depends upon a ruling on this assignment. The majority opinion gives none and it is not contained in affirmance of the judgment of March 6, 1956.

The points involved are discussed from pages 124 to 128 and 53 to 58 of Appellant's Opening and Reply Briefs, respectively, and a rehearing for a ruling thereon is requested.

19. *Fish Hatchery Affects Only Lower Dam*

On page 8 the opinion says that the pretrial stipulation states "that completion of the *dams* and closing of the gates would inundate a large portion of a fish hatchery owned and operated by the State * * * (Emphasis ours). Examination of paragraph 5 of the Pretrial Stipulation will show that only one dam and reservoir are affected by this fish hatchery. The pertinent part of the paragraph reads:

"5. The carrying out of the City's project, upon completion of the Mayfield Dam (which the City estimates to be about two years), and the closing of the gates thereof to fill the reservoir created thereby, will inundate a large portion of a State Fish Hatchery site held for Game Department purposes. * * *"

This language highlights that there was no present threat or danger of taking or interfering with the state fish hatchery.

[fol. 505] Further, the upper, or Mossyrock, dam and reservoir should not be included in any injunctive order. The navigation question affects both dams but the fish hatchery only one. Modification accordingly is requested.

20. *A Hydra-headed Controversy, But Complete Rulings Are Essential to Its Disposal*

The opinion comments at page 10 that this action has evolved into a hydra-headed controversy. We agree, but point out that this is largely due to the gyrations of the Respondents' opposition, and to the Trial Court's action over Appellant's objections in admitting the State as an added party, and in appointing new attorneys at Appellant's expense to reopen the taxpayers' case. The Appellant should not be penalized by being deprived of a ruling on all points involved because they are many.

The opinion, speaking of the controversy, asserts that "a single question at its nucleus is determinative of its disposition". Again, at page 12, speaking of the eminent domain question, the opinion says that since the State is not bound by "the theory advanced by the City", "the position of the remaining parties, and the other assignments of error, would not require examination", and apparently they are not examined.

If, as stated, the question of eminent domain is the nucleus, then this case had no nucleus until after it has been pending for over three and one-half year. (sic)

The effect of the majority conclusion, that the question of the City's power of eminent domain is determinative of this action, is that the taxpayers and the directors and their participartion (sic) herein are treated as of no con-

sequence, the law of the case previously established is swept aside, and not a single assignment of error made by Appellant is considered or passed upon. This we submit is rather drastic.

From the nature of this case, and for the many reasons [fol. 506] herein stated, we submit that the above conclusion is wrong, and that the law should be settled and declared on all points raised, and a rehearing granted for that purpose.

21. *Both the Eminent Domain and Navigation Questions Involve Federal Law*

On page 11 the majority, in referring to the eminent domain question, says "the problem is a local one peculiarly within the province of the courts of this State", and on page 19 that "This is not a question of the right of the Federal government to control all phases of activity on navigable streams, nor a question of its power under the Federal Power Act to delegate that right", and again on page 21 that "It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the State of Washington".

We challenge these assertions. The right of the Federal government to select an instrumentality to carry out its functions (here the regulation of commerce and public lands) is as broad as its right to perform those functions itself. Likewise, its determination of what is or is not a benefit or hindrance to navigation is exclusive and binding on all courts. Both involve construction and application of the Federal Power Act and are Federal questions.

Both these points are discussed at length in Appellant's Briefs (Opening, pp. 91 to 97; Reply pp. 14-22, 90-102).

The majority opinion does not discuss the right of the Federal government to choose an agent, nor the powers of that agent when selected.

Neither does the opinion consider or discuss the navigation question.

We respectfully ask that such question be considered and decided so that, should the ultimate decision herein be adverse, and Appellant elect to seek review thereof before

[fol. 507] the United States Supreme Court, such question, along with that of eminent domain, may be presented.

22. *State's Cross-Complaint Was Independent Action*

On page 15, in urging that the directors' appearance was not the State's, the opinion says that "they are not concerned with ownership of lands by the State in its sovereign capacity."

If these lands and their acquisition are a separate matter with which the Directors were not concerned, it would seem that questions concerning this acquisition do not belong in this suit, and that the City's objection to admission of the State as a separate party defendant was well taken, and allowing it to cross-complaint herein the erroneous introduction of an independent action by way of cross-complaint.

This matter is discussed under the heading "The Respondents were without Right to Cross-Complain for Injunctive Relief" beginning at page 69 of Appellant's Opening Brief.

23. *Validity of Proposed Bonds Does Not Depend on Existence of Power to Condemn*

On pages 13 and 14 the opinion distinguishes between the *power* to condemn and *actual* condemnation.. We acknowledge the distinction, but submit that it has no bearing here. Normally the question of the power to condemn would be determined in a suit to condemn instituted in the proper court when and if the City undertook to condemn.

Here the validity of the City's proposed bond issue is not dependent upon the existence or non-existence of the City's right to condemn any particular State property. The City's ordinance provided for acquisition of the necessary property by purchase *or* condemnation. The City may be successful in purchasing the necessary property and be willing to rely on its ability to do so, either by negotiation or as a result of legislative direction or authorization obtained. Because it may have to rely on pur- [fol. 508] chase only does render its proposed bonds in-

valid. The ordinance might have provided for acquisition by this means only.

We discussed this matter from page 60 to 76 of Appellant's Reply Brief, but the majority opinion makes no mention of it. It was the crux of the Trial Court's declaration on eminent domain.

The State presently has no fish hatchery in the upper reservoir, but presumably it might acquire one, or a wayside park, at any time hereafter, even after work on the Mossyrock Dam was started, and under the majority ruling this would render bonds invalid which up to that time were valid. The right to *acquire* property is distinct from the right to plan to acquire it and to *arrange* financing therefor.

Again, let us suppose in this case that 90 days from now the State under the new administration does agree with the City to sell the fish hatchery site to it. Under the majority opinion would the City's project then come within the scope of its powers, and would its proposed bond issue thereupon become valid? In such case, the City would only be exercising a power (that of purchase through negotiation) which it already possesses. And how would the City go about obtaining a declaration that its proposed bond issue was then valid? And suppose later the State established a fish hatchery in the upper or Mossyrock reservoir, would the bond issue thereupon again become invalid?

We submit that if this Court does finally conclude that an injunction should be issued herein, its scope should be limited to prohibiting interference with the fish hatchery until legal acquisition thereof by the City by purchase or as may be hereafter authorized by law.

24. *Federal Law Part of Law of Every State*

On page 16, in referring to the eminent domain powers of a municipal corporation, the majority says, "It may exercise such power only when it is expressly authorized to do so by the *state legislature.*" *Tepley* v. *Sumerlin,* 46 Wn. (2d) 504, 407, 282 Pac. (2d) 827, is cited in support. [fol. 509] The majority emphasizes the words "state

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legislature". The decision cited does not do so, nor does it turn upon construction of these words, nor involve a grant of federal authority. *The words are used loosely to indicate that the power is not inherent in a municipality.* "Legislative authority" could as well have been used, and certainly authorization by Initiative Act would suffice.

If "legislative authority" is meant, why does this exclude Congressional "legislative authority", especially within the field of federal supremacy? Nothing in the State constitution requires such exclusion, and the supremacy clauses of both State and Federal Constitutions would seem to require its inclusion.

In *Hauenstein* v. *Lyham*, 100 U.S. 483, 25 L. Ed. 628, the Court states that under the mandate of federal supremacy federal laws are "as much a part of the law of every state as its own local laws and constitution". If this is so, there can be no differentiation between powers received from the two sources, except that of federal supremacy. And how can the federal law be a supreme part of the law of every state and still be ignored in construing and applying those laws? Just what is the mental hazard which prevents full acceptance of the federal statute, and says that it cannot do what it purports to do, and thus rejects it?

The above language from the *Hauenstein* case is quoted with approval by this Court in *In re Stixrud's Estate*, 58 Wash. 339, 342, 109 Pac. 343.

25. *Grant of Power to Condemn May Arise by Necessary Implication*

Further, the statement that the power of eminent domain can be exercised "only when it is *expressly* authorized" goes too far. *Statutory interpretation is always a matter of legislative intention.* It may appear by *necessary implication* that the legislative authority intended to grant such power. This is discussed in *Missouri* v. *Union Electric* [fol. 510] *Light & Power Co.*, 42 Fed. (2d) 692, construing the eminent domain provision of the Federal Power Act in an action to acquire property already devoted to a public use.

The majority opinion does not note either of the above decisions or discuss the above points. We respectfully request that the Court now do so.

26. *The City is a Municipality as Defined in the Federal Power Act*

The legislature by RCW 80.40.010 et seq. has vested the City with powers which bring it within the term "municipality" as defined in the Federal Power Act (16 U.S.C.A. 796(7)). *It has thus created an entity qualified to take on the powers conferred by that act.*

There is no *express* state statutory authority for a city or other municipality to accept and act upon a federal power license, yet this authority has been read into the law for many years, and this Court held upon the prior appeal herein that the City's rights were "based on the Federal Power Act", and that the City "having been granted a license * * * is at the present time in the same position as any other licensee under the act" (page 493).

A private company under the act may condemn public property already devoted to a public use. See *Missouri* v. *Union Electric Light & Power Co.*, 42 Fed. (2d) 692.

The State's creation of an entity which fits the definition of "municipality" without limitation on its powers to become a licensee, constitutes the State's consent to exercise by that entity of all powers granted to licensees by the Act. This, we think, is what this Court held on the prior appeal herein. We submit that it is good law, and should not now be changed.

The majority opinion does not discuss these points, except to say generally that the law of the case does not apply to the State because it was not previously a party [fol. 511] herein. If such law does not apply to parties subsequently admitted, even as to matters actually decided and declared, then we submit that such parties should not be admitted, as was the State herein over the Appellant's objection.

We respectfully ask the Court to rule upon this question. Otherwise, there is no requirement for promptness or pro-

tection to litigants in these proceedings, and actions to declare the law become cumbersome and futile.

27. *Fears for the State Capitol*

The majority at page 18 cite as "pertinent" *Seattle & Montana Ry. Co.* v. *State*, 7 Wash. 150, 152, 34 Pac. 551, wherein reference is made to possible condemnation of the State Capitol under a general grant of eminent domain powers.

As pointed out on page 127 of Appellant's Reply Brief, this is a pat argument. It sounds like much, but amounts to almost nothing. It ignores the requirement that public necessity must be shown for any taking, and forgets the doctrine of superior public use.

And assuming one got by these hurdles and was willing to pay the price of acquiring such a property, still under the Federal Power Act procedure the State must be notified of, and may object to, every grant of a license. Were its capitol, or any other of its essential property, to be flooded out, it could make its objections before the Commission and the Courts, with every reasonable expectation of success.

28. *City's Powers of Eminent Domain Under State Statutes*

The majority at page 19 say that after careful review of our statutes, it does not find that the legislature has *expressly* authorized a municipal corporation to condemn state-owned land previously devoted to a public use.

The question of the extent of the City's *power* of eminent domain has come before this Court *by indirection*. Because of this and the length of the briefs on other ques-[fol. 512] tions, examination of the Washington statutes and re-examination of the Washington decisions on eminent domain was not as extensive as it well might have been. Nevertheless, the majority does not seem to have made the re-examination we urged from pages 86 to 90 and 125 to 129 of Appellant's Reply Brief.

Particularly is this true as to the broad powers granted to cities by RCW 80.40.050 and RCW 90.04.030, cited in

our brief, but neither of which is mentioned in the opinion, except perhaps under the catch-all of "other statutes".

RCW 90.04.030 relates specifically to the beneficial use of waters in this state, declares such use a public use, provides for condemnation and for determination of the "superior public use" thereof.

Without such a determination a public wayside park could at the whim of a public official be established almost overnight, and used to block a highly beneficial and comprehensive power development, which in these times would almost certainly flood out some publicly used property. We do not think the legislature intended this, or left the gate open for it.

We submit that RCW 80.40.050 and RCW 90.04.030 should be reconsidered in the light of the reasoning contained in *Missouri* v. *Union Electric Light & Power Co.*, 42 Fed. (2d) 692, and the other cases cited in our briefs, and urge rehearing for this purpose.

29. *Whether Public Use of the Fish Hatchery Will Be Destroyed or So Damaged as to Preclude its Successful Operation is a Question of Fact*

The Washington decisions on eminent domain only go so far as to deny the right to "destroy the public use" of a property, or to "so damage" it as "to preclude its successful operation". *Some adjustment or even taking is permitted and may even be beneficial.* See *Roberts* v. *Seattle*, 63 Wash. 573, 116 Pac. 25.

[fol. 513] In *Tacoma* v. *State*, 121 Wash. 448, 209 Pac. 700, this Court said with reference to another fish hatchery:

> "This property is now devoted to a public use, and if the purported diversion of the waters of the north fork *would destroy this public use* or *so damage* it as to *preclude its successful operation* our inquiry would end here." (Emphasis ours).

Applying these expressions to the situation in hand we find that paragraph 5 of the Pretrial Stipulation (Tr. 242) shows that the fish hatchery site will only be partly flooded. This will include ponds and buildings (which may be

moved), but not the water supply, which is the important feature. The City contends (paragraph VIII of Answer to Cross-Complaint, Tr. 201) that the public use of this hatchery *will not be destroyed,* but that adjustments and alterations to adjoining higher grounds may be made, and with modern improvements even a better and more useful hatchery result.

It should not be assumed without proof, as the majority apparently does, that relocation of ponds and buildings will destroy or so damage the public use of the fish hatchery as to render its operation unsuccessful. It will probably be benefited.

These, we submit, are questions of fact and law for answer elsewhere and not in this declaratory judgment action. In any instance, the decision should be reconsidered and modified so as to allow proof before the proper court on these questions.

30. *The Federal Grant of Power of Eminent Domain to Licensees*

On pages 19 to 21 of the opinion the majority discusses the question of whether the City can "receive" the power of eminent domain which the Federal Power Act grants to every licensee. It says that this "is not a question of the right of the Federal government to control all phases of activity on navigable streams", but of "the capacity of a municipal corporation of this state to act under such a license". It confines the effect of *First Iowa Hydro Electric Cooperative* v. *Federal Power Commission,* 328 U.S. 152, [fol. 514] 90 L. Ed. 1143, 66 S. Ct. 906 (1946), to supersedure of "state statutory prohibitions" as distinguished from what it calls "lack of state statutory authority". It concludes on page 21 with the sum-up that "the Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal Power Act, as we read it, does not purport to do so."

Section 21 of the Federal Power Act (16 U.S.C.A. 814) does, however, *purport* to confer the power of eminent domain on every licensee, and there is nothing in the State

Constitution that appears to prohibit or bar this. The majority cite no decision in support of their assertion, and takes no note of the cases cited by Appellant in its Reply Brief (pages 90 to 111) that sustain the right of a licensee, as an agent and instrumentality of the national government, to exercise this power. As stated there the material thing is the principal's authority, not the parentage of the agent.

Confining the effect of the *First Iowa* case to elimination of "state statutory prohibitions" ignores the pre-emptive and comprehensive nature of the Federal Power Act, and makes it more potent for the state to keep still than to say "no". It would sidetrack completely all the positive provisions of the Federal Power Act that might be construed as granting *any* authority to a municipality as licensee. Since the function being performed by a licensee is a national purpose, the power exercised by an agent or instrumentality must be the national power.

This principle is expressed in *Latinette* v. *St. Louis*, (CCA 7th Cir. 1912) 201 Fed. 676, as follows:

> "Condemnation is an attribute of sovereignty. *It must be exercised directly by the sovereign or through an agency appointed by the sovereign.* Neither the power nor the selection of agents can be transferred to another. *States have the power only for state purposes; the nation only for national purposes.* So the power to condemn mentioned in Sec. 2 must be related to the national power." (Emphasis ours)

[fol. 515] Again in Nichols on Eminent Domain (3rd Ed.) Section 2.15 the authors say:

> "* * * *In such cases Congress may create its own instrumentalities or use those already existing, and it may give to a corporation organized under authority of a state power which the state did not give it and could not constitutionally have given it.*" (Emphasis ours).

This Court held on the prior appeal herein that Appellant was "in the same position as any other licensee under

the Act", and that its rights and authority to proceed were "based upon the Federal Power Act". The majority does not now discuss these previous expressions, yet now places the City in a decidedly different and far less favorable position than that occupied by other licensees under the Act, such as private corporations and cooperative associations, and even private individuals.

That this is so follows from the decision in *Missouri* v. *Union Electric Light & Power Co.*, 42 Fed. (2d) 692, wherein the Court sustained the right of a private company to condemn publicly owned property (including a county courthouse, jail and schools) already devoted to a public use, under its eminent domain powers as a federal licensee.

If the *authority* of the City to construct, operate and maintain the project comes from the Federal government, despite the state's prohibition, the federal act must have added something to the City's *authority* and *capacity*. Wherein, we ask, is there any valid difference between the City's accepting and acting upon such added authority, and its accepting and acting upon a grant of the necessary eminent domain power to effectuate such authority? Just why should it seem more shocking for the Federal government to confer the power of eminent domain on a municipal corporation, over which the State has far reaching control, than to confer similar powers on a private corporation, over which it has practically none? Wherein in this, we ask, lies any "momentous and novel theory of constitutional [fol. 516] government" which "will eventually relegate a sovereign state to a position of impotency"?

Appellant, on pages 96 to 101 of its Reply Brief, cites eleven cases in which municipalities as licensees have exercised the Federal grant of the power of eminent domain, although the state acts creating them in nearly all instances granted them no such power.

We thought these cases were pertinent, but the majority opinion takes no note and makes no mention of any of them. In view of this we think a rehearing of these issues should be granted.

What the majority opinion actually does in effect is to hold Section 21 of the Federal Power Act unconstitutional and ineffective in part. The Act says it confers eminent

domain powers on all licensees. The majority opinion says it cannot, and that its attempt to do so was void.

31. *Licensees Under the Federal Power Act Are Government Instrumentalities*

The Federal government has full power (supposedly) under the commerce clause to control and improve navigable streams. This it may do itself or through any agent or instrumentality of its choosing.

It may make a municipality its agent and instrumentality, and has done so in this case.

That the government may vest its agent or instrumentality with its powers of eminent domain to facilitate and accomplish its purpose is fully established by the many cases cited on pages 90 to 111 of Appellant's Reply Brief. These include many municipalities.

The above case of *Latinette* v. *St. Louis,* (C.C.A. 7th Cir. 1912) 201 Fed. 676, is again particularly interesting. The Court there sustained a Federal grant of eminent domain power to the city of St. Louis for exercise in the adjoining state of Illinois against the will of that state. The Court there said:

> [fol. 517] "'* * * that the nation had the right itself to build and maintain the bridge and approaches, to exercise the power of eminent domain either directly or through a corporation created by it for that end, *without the consent or over the objection of the state, are propositions too well settled to warrant elaboration or debate (citation). The contention is therefore narrowed to this: That Congress could not constitutionally select appellee as the agency through which a national power should be exercised. Nothing in the Constitution forbids the selection of a state corporation as a national agent. In reason the material thing is the principal's authority, not the parentage or birthplace of the agent.*" (Emphasis ours)

We submit that these principles should be applicable in this case, or at least that we should be told why they do not apply.

In *Langdon* v. *Walla Walla*, 112 Wash. 446, 193 Pac. 1, the City of Walla Walla exercised eminent domain powers in Oregon under grant from Oregon. It did not receive these powers from the Washington "state legislature".

The basis of a licensee's right to exercise the power of eminent domain granted by the Federal Power Act resides in its character and selection as agent and instrumentality of the federal government to perform a national function. The power exercised is the *national* power and rightly comes from the Federal government, and except to the extent that the agent is also performing a state function, can come from nowhere else. This Court on the prior appeal herein recognizes these principles, and says it was "the United States whose power" was being challenged herein (p. 493).

We know of no instance in which the right of a chosen instrumentality of the Federal government to exercise this power has been denied. The majority cites none. It does not even discuss governmental agents or instrumentalities. A rehearing is necessary for this purpose.

32. *Remedial Legislation Being Sought*

The majority opinion at page 20 states that the City's inability to act "can be remedied only by state legislation that expands its capacity".

[fol. 518] Without subscribing to this idea, the Appellant, prior to the filing of the opinion, obtained introduction before the present session of the State Legislature of bills dealing with both the eminent domain and navigation questions. They are respectively S.S.B. 264 and S.B. 279. They have both passed the Senate and are now pending in the House. What their fate there may be we do not know.

The first numbered bill would authorize the City to acquire the Mossyrock Fish Hatchery through condemnation proceedings, if negotiation for purchase within 60 days is unsuccessful, and the second would strike the proviso concerning interference with navigation from RCW 80.-40.010. Both proposed acts carry emergency clauses.

Action on these bills, successfully or otherwise, must be concluded shortly. Should either thereof pass and be

signed by the Governor and become law, they would have a bearing on one or both of the above features of this case. They would not affect the remaining assignments of error for which rehearing herein is sought.

Should either bill pass and be signed, counsel for Appellant will file copies thereof with the Clerk and ask that he call the same to the Court's attention.

33. *Conclusion*

We have endeavored to point out what we think are the principal errors of statement and assumptions underlying and permeating the majority opinion.

Its outstanding feature is its startling failure to discuss any point of Appellant's appeal at all.

It overlooks entirely the fact that this is a special statutory action to settle and declare the law, and treats it simply as an action by the State for an injunction.

It concludes by affirming a judgment, with a part of which it disagrees, and the remainder of which it has not discussed.

[fol. 519] We respectfully request that a full rehearing be granted and that the Court consider and pass upon the following matters not considered or passed upon in the majority opinion, to-wit:

1. Admission of the State as an added party (Appellant's Assignment of Error No. 4).

2. Entry of the two restraining orders and the injunction *pendente lite* (Appellant's Assignment of Error Nos. 1, 2 and 3).

3. Appointment of new attorneys for taxpayers with fees to be taxed against plaintiff (Appellant's Assignment of Error No. 7).

4. Trial court's declaration on fish damage (Paragraph 2 of Judgment, Respondents' Assignment of Error No. 2).

5. Trial court's six reasons in support of declaration on eminent domain (Paragraph 1 of Judgment, Respondents' Assignment of Error No. 1).

6. Trial court's declaration on interference with navigation (Paragraph 5 of Judgment, Appellant's Assignment of Error No. 14).

7. Appellant's points in support of grant of power of eminent domain to licensees as governmental instrumentalities under Federal Power Act (Paragraph 1 of Judgment, Respondents' Assignment of Error No. 1).

8. The form and scope of injunction which the Court entered (Paragraph 6 of Judgment, Assignment of Error No. 14).

We further respectfully request that the Court reconsider and pass upon the following matters contained in the majority opinion, to-wit:

1. Conclusion that the eminent domain question should be considered in this suit (Paragraph 1 of Judgment, Respondents' Assignment of Error No. 1).

2. Decision that the City as a licensee under the Federal Power Act is without power to condemn the State's fish hatchery.

[fol. 520] 3. Conclusion or assumption that the City is acting illegally and beyond its powers, and that it should be enjoined from spending any further sums of money relating to the Mayfield and Mossyrock hydro-electric projects.

4. The form and scope of the Judgment which should be entered in this case.

The above constitute a lot of items. Their number largely arises from failure of this Court to heretofore consider or pass thereon.

We further respectfully request that in any instance rehearing be granted and clarification and extension of the decision be had, and that consideration be given to

any remedial legislation which may be passed at the present session of the Legislature.

Respectfully submitted,

/s/ E. K. Murray, Special Counsel, /s/ Marshall McCormick, City Attorney, /s/ Frank L. Bannon, Chief Asst City Attorney, Attorneys for Appellant.

Quinby R. Bingham, James F. Henriot, Of Counsel.

Office and P. O. Address: 300 City Hall, Tacoma 2, Washington.

[fol. 526] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

ORDER CALLING FOR ANSWER TO PETITION FOR REHEARING—March 29, 1957

The court having considered the appellant's petition for a rehearing herein,

It Is Ordered that the Clerk mail to the attorneys of the respondents and cross-appellants copies of the original petition, with a request that they file three copies of an answer thereto within fifteen days and serve a copy thereof on opposing counsel.

Dated this 29th day of March, 1957.

By the Court:

Matthew W. Hill, Chief Justice.

[fol. 527] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

RESPONDENT TAXPAYERS ANSWER TO PETITION FOR REHEARING —Filed April 11, 1957

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[fol. 529] RESPONDENT TAXPAYERS ANSWER TO PETITION FOR REHEARING

Come now the respondent taxpayers and in answer to the petition of appellant, City of Tacoma, for rehearing of the above entitled matter respectfully answer said petition and state as follows:

It never has been the position of respondent taxpayers that the City of Tacoma should not build the Cowlitz Dams as it has seemed to the attorney for the taxpayers that the question of whether or not the dams should be built is purely a discretionary matter of the municipal authorities of the City of Tacoma, subject, however, only to the limitation that this discretion be exercised within the bounds of proper authority, and the question of the extent of this authority has been the only real question to be raised by respondent taxpayers. It has been the position of the State of Washington that it did not want to have the dams built on the Cowlitz River, and it seems to the taxpayers that the primary reason for this objection has been that the State has been opposed to any act that would interfere with the present fish situation on the river. Respondent taxpayers are somewhat unconcerned as to whether fish are or are not damaged, and the sole interest that the taxpayers have had is the question of whether or not the city,

under all circumstances concerned, could build the dams. It has seemed to the respondent taxpayers that the main interest of the city has been to proceed to build the dams and if any objection be raised that the solution of that objection be held off as long as possible in order that the project be brought as far toward completion as could be [fol. 530] done and that the further the structure gets toward completion that the less likelihood that anyone would find it objectionable.

Turning now to the matter at hand as raised in substance by appellant's petition for re-hearing; it would appear from the petition and from statements made by responsible officials of the City of Tacoma, reported generally in the press and radio, that the City, notwithstanding the decision of this court on February 7, 1957, does intend to continue forward with the construction of the dam although it would appear that the present construction contemplated will be for such an elevation on the Mayfield Dam that the reservoir would back up to but not inundate any of the state fish hatchery. It further appears that such a dam would have a maximum over-all elevation of somewhere around 110 feet to 120 feet rather than the originally planned and licensed 185 feet. For this reason the City now seeks to have this court in the instant case also judicially determine the rights, if any, that the City has under the section of the Code (R.C.W. 80.40.010 et seq.) having to do with a structure that would impair, obstruct or interfere with public navigation of the Cowlitz River, the matter of the injunction, and also to have the court determine whether or not there was error in the appointment of taxpayers' and attorneys by the trial court on October 11, 1955.

Taking up the latter point first, while it is, of course, a subject of great interest to this respondent, it would appear that this is not a matter which is *necessary* to determine in this proceeding. The court could of course determine it, or, it could refuse to determine it. The ultimate question to be determined in the proceeding is whether or not there is any legal bar to the construction of the dams by the city. Since nothing has yet been done beyond the planning stage on the Mossyrock dam, but all work has been done on the Mayfield dam, the main questions have

been related to the Mayfield job. In no event, however, does the question of taxpayers presence and costs and attorneys fees for them have any real bearing on the City's power to build these two structures, and that is the question to be determined this proceeding.

[fol. 531] The City in its amended complaint of July 27, 1955, prayed that the court appoint representative taxpayers and counsel—the court did—if they were not necessary, why, pray tell, did the City ask for it? In one breath they ask for representative taxpayers—in the next breath they complain that the court appointed any. Let them make up their minds. Granted that they also asked that the representative taxpayers be immediately dismissed—that was discretionary in the trial court and why all the monkey business to appoint representative taxpayers in the first place? The City seeks a straw man not one of substance. Counsel for taxpayers thinks that he did not only a necessary but a good job, and what is more thinks he should be paid for it and will—if this case is ever terminated—ask the trial court to set a reasonable attorney's fee for his services. That however, does not have to be finally determined at this time. Let the matter abide the conclusion of this action. Since the City has so vehemently opposed his presence in the first place, counsel feels that it would probably appeal from any reasonable fee for services and that it will all have to be determined on appeal at a later time in any event.

Relative to the problem of interference with navigation, R.C.W. 80.40.010, as this court well knows, a change was had from the existing laws in the immediately completed 1957 session of the Washington state legislature. The act has been approved by the governor and the act has an emergency provision and is presently the law; the matter is moot and no further discussion need be had.

Respondents call attention to the Federal Power Commission order and license which were granted under date of December 27, 1951, in which the Federal Power Commission made the following findings:

"(52) Based on cost data in the record and on estimates made to approximate other costs, the Cowlitz Project would be financially and economically feasible if con-

structed in accordance with the plans as presently submitted."

[fol. 532] "(54) The Applicant has submitted satisfactory evidence of its ability to finance and carry to completion the project described in the application, with such modification as may be found to be appropriate."

"(63 b) The Mayfield development will be located on the Cowlitz River at about mile 52 and will consist of a concrete dam composed of a small arch section across the narrow river gorge, an ogee gravity spillway section surmounted by 5 taintor gates, and 2 gravity abutment sections, the dam to have a maximum height of about 240 feet above bedrock and a length of about 850 feet at its crest; a reservoir extending approximately 13.5 miles upstream to the Mossyrock dam with an area of about 2,200 acres with normal water surface at elevation 425 feet, a gross storage capacity of about 127,000 acre-feet and a usable storage capacity of about 21,000 acre-feet with a 10-foot draw-down; a tunnell about 880 feet long, with associated concrete head works, fish screens, forebay, gate house, and steel penstocks leading to the Mayfield powerhouse; a powerhouse with initial installation comprising three 40,000-kilowatt units making a total capacity of 120,000 kilowatts, or 165,000 horsepower, operating under a gross head which would vary from 185 to 175 feet. Provision is to be made for a fourth unit of 40,000 kilowatts. A step-up substation will be installed adjacent to the powerhouse. Double circuit 230-kilovolt transmission lines on steel towers will connect the two powerhouses and extend to the Cowlitz substation on the outskirts of Tacoma. These lines will have an aggregate length of about 60 miles."

As a result of these and other findings the Federal Power Commission at that date licensed this project. It now appears that the appellant must petition for an amendment or change of the existing license, and it is quite possible that the Federal Power Commission might not be willing

to issue a license for a lower Mayfield Dam such as has been suggested by appellant. The provisions of Section 803 (b), Title 16, U.S.C.A. are as follows:

> "Alterations in project works. (b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of a capacity in excess of one hundred horsepower without the prior approval of the commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the commission may direct."

It seems to respondent taxpayers that a re-hearing on the matters which were raised by appellant in its appeal and which were not specifically decided by this court at the time of the decision of February 7, 1957, would only be [fol. 533] material in the event the Federal Power Commission should renew its license in all terms similar to the license of November 27, 1951, except as to the matter of maximum height of the Mayfield Dam. It seems to attorneys for respondent taxpayers that a ruling at this time would be simply advisory and as such contrary to the ruling of this court in the case of *Conaway* v. *Time Oil Company,* 34 Wn. 2d 884, 210 Pac. 1012, where the court states:

> "Our examination of the record convinces us that the appellants asked for, and insisted upon, a broader declaration of rights and more extensive relief than could be justified under the declaratory judgment act, and that the trial judge properly limited the questions to be determined to those raised by actual, specific, justiciable controversies; that is, to actual, as distinguished from potential, disputes. We will hereinafter quote, from appellants' brief, a list of questions to which they insist the trial court should have given an answer, although we find nothing in the record which shows that there was any actual, existing controversy between the parties as to any of the questions which plaintiffs desired the court to answer.

"The general character of these questions is revealed by a page in the appellants' brief which reads as follows: 'Assume that appellant sold other products. Could he be enjoined from so doing? Would he be liable in damages?' 'Must the land remain idle without compensation to appellant if neither party sells gasoline products? 'May respondent place its own agents on the property to sell gas? If so would there be compensation to appellant? 'Appellant desires to know the answers to these matters so that he may proceed intelligently in the future.'

"That amounts to an admission by the appellants that they sought an advisory opinion. In construing and applying the act, we have decided that in order to invoke the jurisdiction of the court under it, there must be an actual, existing justiciable controversy between the parties having opposing interests, which interests must be direct and substantial, and involve an actual, as distinguished from a possible or potential, dispute. The act may not be used for the purpose of obtaining purely advisory opinion from the court. Acme Finance Co. v. Huse, 1952 Wash. 96, 73 P. (2d) 341, 114 A.L.R. 1345; Washington Beauty College v. Huse, 195 Wash. 160, 80 P. (2d) 403; Peoples Park & Amusement Ass'n v. Anrooney, 200 Wash. 51, 93 P. (2d) 362; Brehm v. Retail Food & Drug Clerks Union, 4 Wn. (2d) 98, 102 P. (2d) 685."

[fol. 534] Supposing a situation that may or may not occur is not grounds for declaratory judgment. That is request for advice. Since the City cannot now build on its present license but must obtain an amended or new license from the Federal Power Commission, let it get the license and then if there is action on that license the court can pass on the legal questions presented. It is not the duty of this court to now give advice as to what would be legal or proper in this license to come.

The City still urges that it has the grant of Eminent Domain by the Federal Government and again argues the case of *Latinette* v. *City of St. Louis* (C.A. 7th), 201 Fed. 676, and again argues res judicata and law of the case

(page 8, Petition for Rehearing). Talk about res judicata and law of the case—what about the memorandum decision of Judge Boldt as shown in Appendix C, Respondent State's Brief, page 130, a case where Tacoma and the State were both parties—a case involving the question of Eminent Domain—Judge Boldt stated in part:

> "The motion to dismiss challenges the power and authority of the City to maintain a condemnation action in this court and the jurisdiction of this court to entertain such action. The questions presented are purely matters of law and leave no room for the exercise of discretion by this court. Unless the City is authorized by law to bring and maintain the action in this court and this court has been granted jurisdiction of the parties and subject matter, the motion to dismiss must be granted no matter how desirable or convenient the contrary ruling might be.
>
> "Under the Constitution and laws of the State of Washington, the City of Tacoma is a creature of the state and only has such powers and authority as the legislature has granted to it. Washington law authorizes cities to condemn properties for the purposes involved in this case but the statute (RCW 8.12.050) specifically provides that for such condemnation 'the city shall file a petition in the superior court of the county in which the land is situated.' There is no other provision of state law pertaining to the subject and the quoted language is a mandatory limitation on the power to condemn.
>
> "The federal government does not have authority to remove limitations on the powers of Washington cities expressly provided by the legislature of that sovereign state. Accordingly, Section 814 of the Federal Power Act (Title 16, U.S.C.A.), which grants the right of eminent domain in district courts of the United States to licensees of the Federal Power Commission, does not remove or affect the limitations on the condemnation powers of Washington cities."

[fol. 535] Granted that the city dismissed the action as soon as it learned Judge Boldt's ruling—the city didn't like the "law of that case" but we submit it is applicable and binding here—not the Latinette case which involved an entirely different matter.

Digressing a moment from the Latinette case to the case of *Driscoll* v. *Burlington-Bristol Bridge Co. et al.*, 8 N.J. 433, 86 A. 2d, 201. Here was a case where private companies had two bridges across the Delaware river between Philadelphia and New Jersey built under *separate special acts of Congress*. These acts authorized acquisition by either Pennsylvania or New Jersey or municipal subdivisions of either, by exercise of purchase or eminent domain, and further authorized such acquiring agency in fixing rates of toll "to pay an adequate return on the cost thereof" (Sec. 5 of each act). The Burlington County Bridge Commission planned to charge sufficient tolls so that it would make a profit of $4,000,000.00, which would be available for Burlington County. The transaction leading to the acquisition by the Bridge Commission reeked of bad faith, fraud and corruption on the part of some of the parties thereto and the case is a lengthy one. All justices concurred in an opinion by Chief Justice Vanderbilt in a portion of which he discusses the question of grant of authority from the United States to a municipal corporation where the State had not itself granted this power:

> "It is not necessary for us to interpret the provision in section 5 of the two federal acts authorizing the construction of these bridges to the effect that tolls may be charged 'to pay an adequate return on the cost thereof.' Quite obviously the Federal Government cannot grant a power to an agency of the State which the State itself has not seen fit to grant."

Certiorari was sought to the United States Supreme Court and denied in 1952 as shown at 344 U.S. 823, 73 S. Ct. 25, 97 L. Ed. 652, and a petition for rehearing was also denied at 344 U.S. 888, 73 S. Ct. 181, 97 L. Ed. 687.

The Burlington County Bridge Commission then instituted an action in the United States District Court for New Jersey against the State of New Jersey for a de-

claratory judgment that Congress had the sole and exclusive [fol. 536] jurisdiction in fixing tolls on interstate bridges, that Congress had exercised that power and had passed legislation authorizing the commission to charge tolls which include a profit factor. In the case of *Burlington County Bridge Commission* v. *Meyner,* 133 Federal Supplement, 214, it stated:

"There is therefore a clear adjudication by the Supreme Court of New Jersey to the effect that the plaintiff, by virtue of its creation under the state legislation, has no power to charge tolls which include a factor of profit. It is that adjudication which defendants set up as an estoppel and which plaintiff attacks as beyond the scope of the authority of the State court.

"Plaintiff advances several cases for the proposition that Congress may confer upon an instrumentality a power not specifically granted by the State of its creation. They are all distinguishable from the instant case.

"In each of the cases of Stockton v. Baltimore & N. Y. R. Co., C.C.N.J. 1887, 32 F. 9, appeal dismissed, 1891, 140 U.S. 699, 11 S. Ct. 1028, 35 L. Ed. 603; Seaboard Air Line R. Co. v. Daniel, 1948, 333 U.S. 118, 68 S. Ct. 426, 92 L. Ed. 580; Latinette v. City of St. Louis, 7 Cir. 1912, 201 F. 676; and City of Newark v. Central R. Co., D.C.N.J. 1923, 287 F. 196, affirmed 3 Cir., 1924, 297 F. 77, affirmed 1925, 267 U.S. 377, 45 S.Ct. 328, 69 L. Ed. 666, there was involved a specific federal act granting a certain power to a defined existent instrumentality. In each of those cases it was held that the specific power could be exercised by the instrumentality concerned even though the power had not been granted by the state in its creation. Such is not the situation here. There is no specific federal action, by legislation or otherwise, granting to the Burlington County Bridge Commission the right to charge tolls which would provide for a profit on its cost in acquiring the two bridges. Furthermore, in none of those cases was there a prior adjudication by a state court holding that the instrumentality concerned was

without power to exercise the authority granted by federal action.

"The case of Covington & Cincinnati Bridge Co. v. Kentucky, 1894, 154 U.S. 204, 14 S.Ct. 1087, 38 L.Ed. 962, involved a bridge company incorporated under the laws of Kentucky which provided that the corporation, in order to become effective, required approval by the State of Ohio, since its purpose was to construct and operate a bridge connecting the two states. The necessary approval of both states was obtained and the bridge was erected. Subsequently the State of Kentucky enacted a provision attempting to limit the rate of toll to be charged on the bridge, and for failing to comply with that enactment the bridge company was prosecuted. In reversing the resulting conviction the United States Supreme Court based its holding on the fact that the bridge was built with the consent of both states, and that any action by one of them with respect to the toll-fixing would nullify the corresponding right [fol. 537] of the other. It held therefore that since the bridge accommodated the flow of interstate commerce, Congress alone possessed the power to resolve such differences and to enact a uniform scale of charges which would be operative in both directions. Such a case must be limited to its particular facts and is also distinguishable from the instant case.

"In the case at bar the decision of the New Jersey Supreme Court goes no further than to hold that the plaintiff, having been created under specific legislation of New Jersey, has no power other than those explicitly granted in that legislation. The United States Supreme Court has denied certiorari and has denied a petition for a rehearing. No case has been cited by the plaintiff as authority for its assertion that the adjudication is not binding upon this court under principles of res adjudicata.

"The plaintiff, however, claims that the decision of the New Jersey Supreme Court, with regard to restricting the rates of toll, was beyond the jurisdictional power

of that forum due to the fact that it related to interstate commerce.

"(1, 2) The case of Grubb v. Public Utilities Commission, 1930, 281 U.S. 470, 50 S.Ct. 374, 74 L.Ed. 972, stands for the proposition that state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional cases where the jurisdiction has been restricted by Congress to the federal courts. The United States Supreme Court, in denying certiorari, has seen fit not to review the action of the Supreme Court of New Jersey in this instance, and while such denial is not to be taken as an adjudication on the merits, I fail to see how this court can act as an appellate tribunal to determine the propriety of the judgment of the New Jersey Supreme Court."

The analogy of the Burlington Bridge cases is so close that counsel feels that it is entitled to great consideration in the instant case and effectively answers the City's contention on the points of res judicata and delegation of federal power to state instrumentalities.

Relative to the question of injunction, this has been a matter of great concern to respondent taxpayers as it has seemed to be the settled policy of the City to continue to spend money during all the time the lawsuit has been pending and it would appear from a statement made by the Director of Public Utilities, Dean Barline, to the City Council and Utilities Board on Monday, April 1, 1957, as reported in the Tacoma News Tribune on April 2nd, that the City is still paying the general contractor $21,000.00 per month standby charges while the work is stopped. According to the same news article, the Director of Public [fol. 538] Utilities reported that the City had close to $8,000,000.00 already invested in the Mayfield site. Considering that this project has been in operation only twenty months from the date the contract was let until the date of the decision of February 7th, this would indicate that the City has been spending $400,000.00 per month on this questionable venture. Counsel for respondent taxpayers knows that newspaper articles are not the best

source of authority for legal proof particularly in matters of briefs, but notwithstanding are greatly alarmed at the past attitude and present attitude of the City of Tacoma officials toward the public funds which are under their custody and control. It is the opinion of respondent taxpayers that the City should cease any further expenditure of moneys on this project at once and that the city officials are subject to censure for their continued spending on the project, particularly the $21,000.00 per month standby charges, after the decision of February 7th.

Finally as to the duty of the Supreme Court to consider all matters raised by parties litigant on appeals the rule of this court is that it is not necessary that the court decide all questions. Calling attention to the decision of February 7th, as shown at page 754, *Advance Sheets* (Vol. 149, Wash. Dec.), the court stated in part:

> "If the state of Washington, in its sovereign capacity, is not bound by the theory advanced by the city, we reach the question of the city's power to condemn state lands previously dedicated to a public use. The position of the remaining parties, and the other assignments of error, would not require examination. * * * Since we base our conclusion that the trial court should be affirmed upon other grounds, we do not deem it necessary to expand our reasons for concluding that the taxpayers of Tacoma and the directors of game and fisheries are not precluded by the law of the case and the doctrine of res judicata."

On at least two occasions previously this matter has been discussed by this court. In the case of *Ajax* v. *Gregory*, 177 Wash. 465, 32 Pac. 2d, 560, Judge Main speaking for the en banc court stated:

> [fol. 539] "There are a number of other questions discussed in the briefs, some of which are covered by what has already been herein said. Others are not now before us. Notwithstanding this, we have been invited to decide all the questions that are presented; but this we cannot do. It has long been the settled policy of this court, in disposing of cases presented, to only

decide the questions which are necessary to the decision of the particular case."

Again in the case of *In Re Ellern,* 23 Wash. 2d, 219, 160 Pac. 2d. 639, the court stated:

"The appellant has urged other grounds as affecting the validity of the judgment, but it is unnecessary to consider them in view of the conclusion we have reached. We decided in Ajax v. Gregory, 177 Wash. 465, 32 P. (2d) 560, that it was the settled policy of this court in disposing of cases presented to only decide the questions that were necessary to a decision of the particular case. This rule is applicable to the case now before us."

It is submitted that there is no basis for granting appellant's petition for rehearing.

Respectfully submitted,

Lynch and Lynch, Attorneys for Respondent Taxpayers, by John S. Lynch, Jr.

[fol. 540] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

STATE'S ANSWER TO TACOMA'S PETITION FOR REHEARING—Filed April 12, 1957

Proofs of service (omitted in printing).

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[fol. 543] STATE'S ANSWER TO TACOMA'S PETITION FOR REHEARING

Pursuant to the order of the Court dated March 29, 1957, Respondent-Directors and State of Washington, hereinafter called "the State", submit this brief in answer to Tacoma's petition for rehearing, and respectfully urge this Court to deny said petition.

I

The Majority Opinion Is Complete and Clear and Needs No Clarification

The State strongly disagrees with the City's opening remarks that the majority opinion appears both incomplete and unclear. Stated simply, the City is enjoined from continuing to spend public funds on a project which it cannot complete because of its inability to acquire certain state land essential to the project. Even though the City may disagree with such decision, it cannot be mislead (sic) by it.

We also believe that it is disrespectful of the City to criticize this Court for not discussing every question raised in appellant's brief. It is the settled policy of this Court not to do so if such discussion is not necessary to the deci-
[fol. 544] sion. The following language from *Ajax* v. *Greg-*

ory, 177 Wash. 465, page 475, 32 P. (2d) 560 (1934), makes this clear:

> "There are a number of other questions discussed in the briefs, some of which are covered by what has already been herein said. Others are not now before us. Notwithstanding this, we have been invited to decide all the questions that are presented; but this we cannot do. It has long been the settled policy of this court, in disposing of cases presented, to only decide the questions which are necessary to the decision of the particular case."

In addition, there should be no criticism of this Court for affirming the granting of the injunction by the trial court on a different theory of law than that relied on by such trial court. This Court's right to do so is well settled. *Vikingstad* v. *Baggott*, 46 Wn. (2d) 494, page 498, 282 P. (2d) 824 (1955).

It is quite apparent from the length and scope of the majority and minority opinions that the Court considered all matters raised very carefully before rendering its decision. In its petition for rehearing, the City has not cited any new authorities or points of law, or material omissions or errors of fact which could justify a change in the result. Under such circumstances, a rehearing is almost never granted. 4 C.J.S. 2027, App. & Err., Sec. 1411. The briefs submitted by all parties were quite lengthy and complete, and extra time was granted for oral argument. There was ample time for the Court to consider all matters presented, and we believe it did so. It cannot be said that a rehearing would shed new wisdom and light on the case.

II

Court Need Not Consider Moot Questions or Render Advisory Opinions Under the Declaratory Judgment Act or Answer Questions Which Could Not Change the Result

In its petition, the City asks this Court to answer questions that are either moot, advisory, or could not change the result. This Court need not do so. In *Hansen* v. *West Coast Wholesale Drug Co.*, 47 Wn. (2d) 825, page 827,

[fol. 545] 289 P. (2d) 718 (1955), this Court held that it will not decide questions which are moot. In *DeGrief* v. *The City of Seattle et al.*, 149 Wash. Dec. 36, page 47, this Court quoted, with approval, the following language from one of its former decisions, refusing to give advisory opinions in a declaratory judgment action:

> "'To decide these questions on the record before us would result in rendering a purely advisory opinion, which we will not do in a declaratory judgment action. (Citing case)'".

A rehearing will usually be refused if it is not made to appear that it would change the result. 4 C.J.S. 2027, *supra.*

We will now point out questions raised by the City which are either moot, advisory, or could not change the result.

A. *Navigation Question Is Moot.*

The proviso in R.C.W. 80.40.010 which prohibits municipal corporations from interfering with public navigation has been stricken by the 1957 legislature by the passage of Chapter 209, Laws of 1957. A petition to have the emergency clause removed from this statute was denied by this Court on April 5, 1957. Therefore, this obstacle to prevent construction of the Cowlitz project no longer exists. Since this question is now moot, it need not be discussed by this Court.

B. *Question of Trial Court's Entry of the Two Restraining Orders and the Injunction Pendente Lite Is Moot.*

At the time the restraining orders and the injunction *pendente lite* were granted by the trial court, the City had a right to appeal from such orders under the authority of Rule 14(3), Rules on Appeal, 34A Wn. (2d) 20. The City did not appeal. These temporary restraining orders and injunction *pendente lite* have since been replaced by the trial court's judgment granting a permanent injunction [fol. 546] as affirmed by this court, and therefore, they

no longer exist. It would, therefore, be useless for this Court to discuss them as any such question is moot.

C. *Question of Appointment of Attorney for Taxpayers With Fees To Be Taxed Against City Is Advisory.*

On page 750 of *Tacoma* v. *Taxpayers et al.*, 149 Wash. Dec. 744, this Court found that the previously appointed taxpayers "had withdrawn from the proceeding and had defaulted within the provisions of the declaratory judgment act". We believe this to be a proper determination and should not be overturned. Mr. Lynch has performed a complete and valuable service for the taxpayers of Tacoma, and should be compensated. It will be necessary for him to apply to the trial court for setting of his attorney's fees. The City of Tacoma can appeal any award made. Any questions regarding his appointment and the extent of his fees can be determined at that time. Therefore, any further discussion by this Court on that question at this time would be purely advisory.

D. *Rehearing On Question of the Admission of the State of Washington as Added Party Could Not Change the Result.*

The City argues that this Court should discuss the propriety of the State of Washington being added as a party defendant. In its opinion, on page 754 of the advance sheets, the Court held that the taxpayers of Tacoma and the directors of Game and Fisheries were not precluded by the law of the case and the doctrine of *res judicata*. Therefore, even if the State of Washington were to be considered improperly added as a party, the result of the decision would remain the same since the interests of the other parties mentioned are parallel with the interest of th State.

We believe, however, that the wide discretion of a trial judge to add parties in a declaratory judgment action [fol. 547] justifies the addition of the State of Washington as a party to this action. See cases cited on page 54 of the State's opening brief entitled Brief of Respondents.

E. *Rehearing On Question of Fish Damage Could Not Change the Result.*

We believe the City has no right to even ask the Court to discuss the second paragraph of the trial court's decree on the question of damage to fish. This was the State's assignment of error, and not the City's, and the State does not wish any discussion thereon as it could not change the result. The reason for the State's assigning this as error is set forth quite completely on pages 115-119 of the State's opening brief entitled Brief of Respondents, and on pages 21-22 of Cross-Appellants' Reply Brief. We did not contend that damage to fish *per se* could bar the project, but only damage to fish resulting in damage to state hatcheries' trapping these fish. In other words, the State's only purpose for raising this question was to discuss its effect on the eminent domain question. However, upon further examination of the trial court's judgment, it is apparent that this second paragraph, dealing with fish, referred to damage to fish *per se,* and was not intended to touch upon the eminent domain question, since that question was referred to under a separate paragraph (paragraph 1). This is further borne out by the fact that the Federal Power Commission and the federal courts, which are referred to in the paragraph relating to damage to fish, did not discuss the eminent domain question. In any event, however, a discussion of this paragraph could not have any effect on the result of the decision, and any further clarification of it would be purely advisory.

F. *This Court Need Not Discuss All of the Trial Court's Reasons for Refusing to Consider the Eminent Domain Question.*

The City complains that the opinion does not discuss all [fol. 548] of the trial court's reasons for refusing to consider the eminent domain question. On page 755 of the advance sheets, thi Court points out authority to the effect that courts may order or forbid the doing of an act within the State, although to carry out the decree may involve doing an act or affecting a thing in another state.

There is no further discussion necessary to justify a consideration of the eminent domain question.

As pointed out previously, this Court may affirm a trial court judgment on a different ground than that relied on by the trial court. There have been a number of instances when the trial court's ground has not even been discussed since such discussion would not be necessary to a determination of the case. This Court need not discuss every statement made by the trial court as it would undoubtedly result in extremely lengthy opinions, without accomplishing anything. The trial court made several statements from the bench relating to the eminent domain question without citing any legal authority whatsoever; nor did the City of Tacoma cite any authority to substantiate such statements. We, therefore, do not believe a rehearing is necessary to further discuss the trial court's oral statements on eminent domain since it is not necessary to a decision of the case.

III

The Injunction Should Not Be Modified Since the City Lacks the Authority to Continue Spending Money on a Project Which It Presently Has No Authority to Complete

The City argues that the form and the scope of the injunction should be modified, and that it should not be enjoined from continuing with the project and spending public funds. Its reason for such request is that the state property which it cannot presently acquire will not be damaged immediately.

[fol. 549] In effect, the City is asking this Court to authorize its allegedly responsible city officials to spend funds held in trust for the taxpayers of the City of Tacoma on a useless and incomplete public monument which neither its city ordinance nor its federal power commission license has authorized. To permit this would be error. This point has already been extensively covered on pages 22-29 of Cross-Appellants' Reply Brief under the title "Respondents are entitled to enjoin further construction now". It is also discussed on pages 50-54 of the State's opening brief.

The U. S. Supreme Court has held that the mere adop-

tion by Congress of a plan of flood control which would ultimately flood certain property "constitutes a taking of it—as soon as the government begins to carry out the project authorized". *Hurley* v. *Kincaid,* 285 U. S. 95, pages 103-104, 76 L. Ed. 637 (1931). Therefore, the mere commencement of the Cowlitz project as presently proposed constitutes a taking of the State land which it cannot acquire, regardless of when the State land would be damaged. Therefore, the State is entitled to have any further construction enjoined now.

There is a further reason why the City cannot continue constructing and spending money on the project at this time. The City can only build the project in accordance with the plan authorized by its Federal Power Commission license, and its City Ordinance #14386. This plan will result in the inundation of State property which the City cannot acquire. Neither its license nor its ordinance authorize it to continue construction of a project which under existing laws it cannot complete. Nor can the City continue construction under the guise that it is building the project under a different plan which will not inundate State land, because neither the license nor its ordinance [fol. 550] authorize construction of the project under such different plan. The only reason why the City would wish to continue construction would be to try to coerce the next legislature into granting it the authority to acquire the necessary State land to complete the project. The 1957 legislature refused to do so. To permit the City to continue gambling with public funds in this manner would be unconscionable. We therefore urge this Court not to deviate from its position of enjoining the City from spending any further public funds until it has proper authorization.

IV

This Court Was Correct in Holding That the Federal Government May Not Confer Corporate Capacity Upon Local Units of Government Beyond the Capacity Given Them by Their Creator

In its opinion on page 761 of the advance sheets, this Court stated the following proposition:

> "The Federal Government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal Power Act, as we read it, does not purport to do so."

The City now asks this Court to rehear this question and to reverse itself on this proposition. It presents no additional authorities whatsoever to justify a reversal. The State has extensively covered this question on pages 98-115 of its opening brief, and on pages 30-62 of Cross-Appellants' Reply Brief. All the cases cited by the City in its briefs were distinguished in the latter brief. The case which has been primarily relied upon by the City, and also in the dissenting opinion, is *Latinette* v. *City of St. Louis* (C.C.A.—7th Ill.), 201 Federal 676 (1912). In that case, St. Louis, a Missouri municipal corporation, was permitted to appropriate land in Illinois under a federal grant of authority to do so. The Court discussed the right of the Federal Government to grant eminent domain powers to [fol. 551] a city. With this we agree, provided the city has authority from its parent state to accept such grant. Neither Tacoma nor the dissenting opinion points out, as stated in the *Latinette* case, *supra,* that the State of Missouri, the parent state which created St. Louis, granted to its City, by statute, the authority to accept a federal grant of right to appropriate land in Illinois. This case is discussed on pages 53-54 of Cross-Appellants' Reply Brief. The City of Tacoma could only use a federal grant of authority to condemn land, provided the Washington State legislature expressly authorized it to accept such a grant.

A very analogous case consistent with this Court's opinion is *Driscoll* v. *Burlington-Bristol Bridge Co.,* 86 A. 2d 201, 8 N. J. 433, (1952), cert. den. 73 S. Ct. 25, 33, 34, 344 U. S. 838, 97 L. Ed. 652, reh. den. 73 S. Ct. 181, two cases, 182, 344 U. S. 888, 97 L. Ed. 687. This was an action by the Governor and Attorney General of New Jersey to set aside the acquisition by the Burlington County Bridge Commission of two toll bridges across the Delaware River between New Jersey and Pennsylvania. The Burlington County Bridge Commission was a political sub-division of

the State of New Jersey. Construction of these two bridges was authorized by two separate special acts of Congress. Section 5 of each of these congressional acts authorized the acquisition of the bridges by a political sub-division of either of the two States, and further authorized the charging of tolls thereon *at a profit.* The Burlington County Bridge Commission purchased these bridges under questionable circumstances too lengthy to describe and not material to the issue here. New Jersey State law authorized such a commission to purchase bridges but was [fol. 552] silent on whether it could charge a toll *at a profit.* The Court concluded that since it was not expressly authorized, the Commission could not charge tolls *at a profit* under the law of the state which created it. The Commission contended that it could do so under the authority of the above-mentioned federal acts since the Federal Government has paramount jurisdiction over structures on navigable waters. In answer to this contention, Chief Justice Vanderbilt, speaking for the unanimous court, stated the following on page 229 of the opinion in the *Atlantic Reporter*:

> "It is not necessary for us to interpret the provision in section 5 of the two federal acts authorizing the construction of these bridges to the effect that tolls may be charged 'to pay an adaquate return on the cost thereof.' *Quite obviously the Federal Government cannot grant a power to an agency of the State which the State itself has not seen fit to grant.*" (Emphasis supplied)

As pointed out in the citation of the case, the United States Supreme Court refused to grant certiorari.

The Burlington County Bridge Commission subsequently brought an action in Federal Court against the Governor and Attorney General for a declaratory judgment on the above question. This case is *Burlington County Bridge Commission* v. *Meyner,* 133 F. Supp. 214 (1955). In this case, Chief Judge Forman held against the Commission and agreed with Chief Justice Vanderbilt that Congress could not confer upon a State instrumentality a power not specifically granted by the State of its creation.

Judge Boldt likewise agreed with this Court when he stated the following proposition in the case of *Tacoma* v. *Severns*, a copy of which is attached as Appendix "C" in the State's opening brief:

> "The federal government does not have authority to remove limitations on the powers of Washington cities expressly provided by the legislature of that sovereign state. Accordingly, Section 814 of the Fed- [fol. 553] eral Power Act (Title 16, U.S.C.A.), which grants the right of eminent domain in district courts of the United States to licensees of the Federal Power Commission, does not remove or affect the limitations on the condemnation power of Washington cities."

The City and the dissenting opinion cite the case of *State of Missouri ex rel. Camden County* v. *Union Electric Light & Power Co.*, District Court, C.D. Missouri, W.D. 42 F (2d) 692 (1930), which only stands for the proposition that the right to condemn public land arises by necessary implication from a general grant of the power of eminent domain. That case is discussed and distinguished from the instant case on pages 57-60 of Cross-Appellants' Reply Brief. This Court has consistently disagreed with the proposition that a general grant of eminent domain powers implies the right to condemn public property. If applied in the Cowlitz case, it would clearly be error. At the 1957 session of the legislature, the City sponsored substitute senate bill #264 which would have authorized the City to acquire the necessary State land for the Cowlitz project. The bill was defeated. In the face of such clear legislative intent not to grant the City the authority to condemn State land, how can the City argue that it has the authority by implication? We therefore urge this Court not to rehear this matter as the legal conclusions set forth in the majority opinion are correct.

V

Conclusion

On page 29 of its petition for rehearing the City lists several questions which it claims were not discussed by

this Court. The City contends that failure to discuss these questions is grounds for a rehearing. We have pointed out in this brief that none of these questions need be discussed as they are either moot, call for an advisory opinion, or could not change the result regardless of how they were decided. It is the settled policy of this Court not to discuss [fol. 554] questions which are not necessary to a disposition of the case. Therefore, for the foregoing reasons we respectfully urge this Court to deny the City's petition for rehearing.

Throughout its petition the City attempts to reargue the case on appeal. It cites no new authorities which would justify a reversal of the decision. We have not attempted to answer many of these arguments as we feel they were fully covered in the briefs. The City asks the Court to give advisory opinions on many questions. We have not listed some of them in detail as we feel they are quite apparent. We believe it is sufficient to say that this Court does not give advisory opinions under the declaratory judgment act.

Respectfully submitted,

John J. O'Connell, Attorney General, /s/ Joseph T. Mijich, Assistant Attorney General.

Office and P.O. Address: 2018 Smith Tower, Seattle, Washington.

[fol. 555] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 33706

THE CITY OF TACOMA, a municipal corporation, Appellant,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State, Respondents and Cross-appellants.

ADDITION TO OPINION—Filed April 30, 1957

The following is herewith substituted for the last paragraph of the opinion filed in the above-entitled case on February 7, 1957, as the same appears in 149 Wash. Dec. 744, 307 P. (2d) 567:

In our review of this case under the declaratory judgment statute (RCW 7.25.010), we are limited in our consideration by the plan of construction established by the ordinances of the city of Tacoma and the license of the city of Tacoma received from the Federal power commission, as they appear in the record before us. It is not within the province of this court to give an advisory opinion as to what the law may be under a different plan of construction, which may be established by different ordinances or licenses.

[fol. 556] Based upon the present record, we agree with that portion of the judgment of the trial court which determines (1) that the question of damage to fish which might result from construction of the dams is not now a proper one for the consideration of the court; and (2) that Laws of 1917, chapter 117, §§27 and 36, as amended (RCW 90.20.010—state permit for appropriation of water; RCW 90.28.060—state permission to build a dam), Laws of 1949, chapter 9 (RCW 75.20.010 *et seq.*—establishing Columbia river fish sanctuary), and Laws of 1949, chapter 112, §§46 and 49, as amended (RCW 75.20.050—state permit to divert water; RCW 75.20.100—approval of building plans for the protection of fish), are

> " . . . inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project."

Our conclusion is amply supported by *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U. S. 152, 90 L. Ed. 1143, 66 S. Ct. 906 (1946).

The same authority supports the conclusion that the trial court erred when it issued the injunction

" . . . for the reason that said project would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of R.C.W. 80.40.010 et seq."

However, we have held on many occasions that if the judgment of the trial court is based upon erroneous grounds, it will be sustained, if correct on any grounds within the pleadings and established by the proof. *Ennis* v. *Ring*, 149 Wash. Dec. 279, 283, 300 P. (2d) 773 (1956). [fol. 557] We have already held that the question of the capacity of the plaintiff to acquire property of the state of Washington by eminent domain is within the jurisdiction of the court; and that the city of Tacoma has not been endowed with the statutory capacity to condemn state lands previously dedicated to a public use. Without this power, it cannot accomplish the plan set forth in the city ordinances before us; hence, for the reasons we have discussed herein, the judgment of the superior court is affirmed.

Weaver, J.

We concur:

Hill, C. J., Schwellenbach, J., Rosellini, J., Ott, J.

[fol. 558] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

ORDER DENYING REHEARING, ETC.—April 30, 1957

The court having considered the appellant's petition for a rehearing herein and its alternative petition for a clarification of the opinion heretofore filed herein, and reported in 149 Wash. Dec. 744, 307 P. (2d) 567, together with the answers thereto filed by the respondents The Taxpayers of Tacoma and The State of Washington, respectively,

Now, Therefore, It Is Ordered that the petition for rehearing be and it is hereby denied.

And It Is Further Ordered that the petition for clarification be granted in part; and to achieve such clarification, an addition to the opinion heretofore filed and reported has been filed this day.

And It Is Further Ordered that the addition to the opinion filed this day be made a part of the opinion as published in Volume 49 (2d) of the Washington Reports.

Dated this 30th day of April, 1957.

By the Court:

/s/ Matthew W. Hill, Chief Justice.

[fol. 559] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Thurston County No. 26572

THE CITY OF TACOMA, a municipal corporation, Appellant and Cross-respondent,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State, Respondents and Cross-appellants.

No. 33706

JUDGMENT—Tuesday, April 30, 1957

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 30th day of April, A.D. 1957, on motion of John J. O'Connell, Attorney General, and Lynch and Lynch of counsel for re-

spondents and cross-appellants, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said The Taxpayers of Tacoma, Washington, Robert Schoettler, as Director of Fisheries, John A. Biggs, as Director of Game, of the State of Washington, and The State of Washington, a Sovereign State, have and recover of and from the said The City of Tacoma, a municipal corporation, the costs of this action taxed and allowed at Seven hundred twenty-three and 64/100 ($723.64) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 560] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

APPLICATION FOR STAY OF EXECUTION AND ENFORCEMENT OF JUDGMENT TO ENABLE APPELLANT TO APPLY FOR AND OBTAIN A WRIT OF CERTIORARI—Filed May 7, 1957

To the Honorable Matthew W. Hill, Chief Justice of the Supreme Court of the State of Washington:

Comes now appellant City of Tacoma and, pursuant to the provisions of U.S.C.A. Sec. 2101, respectfully applies for an order staying the execution and enforcement of the final judgment in this cause affirmed by decision of this Court filed February 7, 1957, as supplemented by the addition thereto filed April 30, 1957, for a reasonable time to enable appellant to apply for and obtain a writ of certiorari from the United States Supreme Court.

Appellant deems said final judgment and decision subject to review by said Court for the special and important reasons that this Court has decided Federal questions of substance therein not heretofore decided by said Court involving interpretation and application of the provisions of the Federal Power Act relating to eminent domain, and re-

lating to the standing and finality of findings and order of the Federal Power Commission as affirmed on review by the Federal courts.

The reasons why a stay is deemed necessary are that appellant has to date, on the assumption that it was in the same position as any other licensee under the Federal Power Act, expended approximately $7,000,000.00 in furtherance of the power project which is the subject matter of this suit, and that the preservation and protection of this investment, and the recoupment thereof should appellant be compelled to abandon said project and dispose [fol. 561] of its interest therein, requires that certain further temporary and continuing expenditures be made in relation to said project pending action on such application for a writ of certiorari.

The present status of the project is as follows:

There has been completed on the Mayfield portion of the project all access roads, a diversion tunnel, the 860-foot long power tunnel except the last 125 feet thereof, substantially all the excavation for the dam except that in the bed of the river, placement of a coffer dam for the power house, all excavation for the power house, and installation of equipment for manufacturing and pouring of concrete, together with all necessary office and auxilliary (sic) buildings for construction.

The present physical plant will require certain custodial and maintenance employees to protect the same and equipment therefor, and for pumping out tunnels and other areas to prevent damage from water accumulation. The incompleted power tunnel should be inspected by a competent mining engineer to determine if it is necessary to place concrete piers under certain of the steel tunnel supports to insure their adequacy during a period of prolonged shutdown and to prevent collapse. Certain safety problems will have to be met from time to time as they arise. The power house coffer dam must be checked daily, pumped frequently and, in time of flood, flooded to prevent it from being washed out and causing damage to downstream riparian owners.

A small maintenance force will also be necessary to protect the project area and installations from fire, theft and

vandalism, to police the area to keep out members of the public who might otherwise be injured in some areas.

The preparation of construction drawings for the Mayfield portion of the project was started in the summer of 1955 and has been continued since both by the City's force and through the Harza Engineering Company, Consulting Engineers, of Chicago, Illinois, and at the present time [fol. 562] the bulk of these drawings, with exception of electrical drawings, are nearing completion and can be completed with the City's present organization and such Harza Engineering Company drawings reviewed and necessary modifications made therein in about 90 days, and such work must be completed in order to properly incorporate in permanent form the results of research and investigations made by the City's present staff and to preserve the City's investment therein, should sale or other disposal of said project by the City hereafter become necessary.

Included in the above drawings are the group of drawings relating to proposed new fish facilities, on which much research and model studies have been devoted. These facilities are of new design and have been developed by the City's staff in conjunction with the staff of the Washington State Departments of Fisheries and Game and the U. S. Fish and Wildlife Service, and should be completed by the present staff if the results of such studies and research are not to be lost to the great public damage.

The cost of completing such drawings will be less than the damages resulting from failure to complete same.

Title searches as to property relating to the Mayfield portion of the project are approximately 80% complete, but a portion thereof has not been embodied in title reports or typed up so as to be in final or permanent form and should be completed to preserve the value thereof.

Three survey crews have been working making surveys in the area of the Mossyrock portion of the project, and about one month's time is necessary for these crews to permanently mark work in progress so as to preserve it for future use or sale.

Appellant desires to remove the present obstacle to construction of the project by arranging with the State of

Washington through negotiations for the acquisition or relocation, if possible, of the Mossyrock Game Fish Hatch-
[fol. 563] ery contained in the Mayfield reservoir area, and should be permitted to make necessary studies and surveys, and to conduct necessary negotiations therefor, pending action on the application for writ for certiorari herein.

Indebtedness has been incurred by appellant for services rendered and materials furnished to appellant on the project up to and including April 30, 1957, for which appellant believes settlements should be negotiated and payment permitted.

The State and its Departments of Fisheries and Game will not be injured or adversely affected by the granting of a stay permitting appellant to do the things above specified and to make the necessary expenditures therefor pending action on its application for a writ of certiorari.

Further, the doing of such things and the making of such expenditures will serve to preserve and protect the investment already made by appellant in said project and will be beneficial to the taxpayers of the City, rather than detrimental thereto.

By reason of the nature of this proceeding, any security required in connection with the granting of the stay herein requested would in effect be given by the City for the benefit of the City, since both the city officials and the taxpayers are acting herein in a representative capacity and only a nominal bond, if any, should be required in connection with the limited stay herein requested.

Dated at Tacoma, Washington, May 7th, 1957.

E. K. Murray, Special Counsel, Marshall McCormick, City Attorney, Frank L. Bannon, Chief Asst. City Attorney, Attorneys for Appellant.

Quinby R. Bingham, James F. Henriot, Of Counsel.
Office and P. O. Address: 300 City Hall, Tacoma, Washington.

[fol. 564] [File endorsement omitted]

Duly sworn to by John H. Anderson, jurat omitted in printing.

[fol. 565] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

AFFIDAVIT OF HENRY A. COLE—Filed May 7, 1957

State of Washington,
County of Pierce, ss.

Henry A. Cole, being first duly sworn, on oath deposes and says:

I am Manager of the Major Projects Division of the Department of Public Utilities of the City of Tacoma and in that capacity have been the Engineer in charge of the construction of the Cowlitz Power Development of the City of Tacoma, and am familiar therewith. I have read the foregoing application for a stay, and the statements therein contained concerning the status of the City's project and the necessary work to preserve the investment of the City therein as set forth therein are true and correct.

/s/ Henry A. Cole

Subscribed and sworn to before me this 7th day of May, 1957.

Frank L. Bannon, Notary Public in and for the State of Washington, residing at Tacoma.

[fol. 566] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

ORDER GRANTING STAY OF EXECUTION AND ENFORCEMENT OF JUDGMENT—May 7, 1957

Upon application of appellant City of Tacoma by E. K. Murray, Special Counsel, and Frank L. Bannon, Chief Assistant City Attorney, for a stay of execution and enforcement of the final judgment in this cause affirmed by decision of this Court filed February 7, 1957, as supplemented

by the addition thereto filed April 30, 1957, for a reasonable time to enable appellant to apply for and obtain a writ of certiorari to the Supreme Court of the United States, and good cause appearing therefor, it is

Ordered that the execution and enforcement of said judgment be and the same are stayed until the 31st day of December, 1957, to enable appellant to apply for and obtain a writ of certiorari from the Supreme Court of the United States.

This stay is upon the condition that pursuant thereto appellant shall confine any expenditure of funds relating to its Cowlitz Power Project to custodial, safety, security, maintenance and other items for the preservation and protection of the properties of said project and its investment therein, the completion of construction drawings under way relating thereto, the writing up and placing in report form of title searches heretofore begun, the permanent marking of present survey work under way, the negotiation for possible acquisition or relocation of the Mossyrock Game Fish Hatchery of the State of Washington, expenses for assertion and maintenance of its legal and property rights, and the liquidation or settlement of indebtedness [fol. 567] incurred for services rendered or materials furnished in connection with said project up to and including April 30, 1957.

This stay is further upon the condition that appellant within five (5) days hereafter file herein a good and sufficient bond in the amount of Five Thousand Dollars or, in lieu thereof, deposit such sum with the Clerk of this Court, that if appellant fails to make application for such writ within the time allotted therefor, or fails to make its plea good in the Supreme Court of the United States, it shall answer for all damages or costs which respondents may sustain by reason of the stay.

Dated at Olympia, Washington, May 7th, 1957.

/s/ Matthew W. Hill, Chief Justice.

Presented by:

/s/ E. K. Murray, Of Attorneys for Appellant.

[File endorsement omitted]

[fol. 568] Affidavit of mailing (omitted in printing).

[fol. 569] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed May 14, 1957

To the Honorable Robert Holstein, Clerk of the Above Entitled Court:

Please prepare and certify in accordance with the provisions of Rule 21 of the Revised Rules of the Supreme Court of the United States and as soon as possible, a transcript of the record in this cause, including the proceeding in the above entitled court.

Upon notification your charges will be immediately paid.

Upon completion please immediately notify the undersigned and deliver transcript of record to them.

Dated at Tacoma, Washington, May 13, 1957.

E. K. Murray, Special Counsel, Marshall McCormick, City Attorney, Frank L. Bannon, Chief Asst. City Attorney, Attorneys for Appellant.

[fol. 570] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 33706

THE CITY OF TACOMA, a municipal corporation, Appellant,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State, Respondents and Cross-Appellants.

MEMORANDUM OF DISAGREEMENT WITH ORDER GRANTING STAY OF EXECUTION AND ENFORCEMENT OF JUDGMENT ENTERED MAY 7, 1957—FILED MAY 21, 1957

This instrument is designated a "Memorandum of Disagreement with Order Granting Stay of Execution and Enforcement of Judgment entered May 7, 1957." The reason is this: While the word "dissent" means to differ in opinion; to be of contrary sentiment; to disagree; it also is the opposite of "consent." As used in the judicial process, the word "dissent" would appear to have an additional meaning; namely, that a justiciable issue had been presented to and passed upon by the judge dissenting. Such is not the case in the instant matter; hence, for the sake of accuracy, I label this a "Memorandum of Disagreement."

The opinion of this court, in the above-entitled action, was filed in the office of the clerk of this court February 7, 1957. 149 Wash. Dec. 744, 307 P. (2d) 567 (1957). The appellant filed a petition for rehearing and for clarification [fol. 571] of the opinion. The petition for rehearing was denied; the petition for clarification was granted and an addendum to the original opinion was filed April 30, 1957. 150 Wash. Dec. 196, —— P. (2d) ——.

The remittitur and judgment of this court was transmitted to the trial court on April 30, 1957.

May 7, 1957, counsel for appellant filed and presented to the chief justice of this court an "Application for Stay of Execution and Enforcement of Judgment to Enable Appellant to Apply for and Obtain a Writ of Certiorari." It has been stated, although it does not appear in the record, that counsel for the Taxpayers of Tacoma were also present. It would appear that counsel for the State of Washington were not present nor had they been notified of presentment of the application for stay of execution of the judgment.

When a remittitur, designating the final judgment of this court, has been duly authenticated and transmitted to the court from whence the appeal has been taken (Rule on Appeal 2, 34A Wn. (2d) 15, as amended, effective January 3, 1956), this court loses jurisdiction. *Kosten* v. *Flem-*

ing, 17 Wn. (2d) 500, 136 P. (2d) 449 (1943), and cases cited.

The right and privilege of a judge of this court to stay execution of judgment for a limited time and for a limited purpose spring from the Federal statute. 28 U.S.C. 1952 ed. §2101 requires appellant to apply for a writ of certiorari to the supreme court of the United States within ninety days of final judgment.

In order to permit appellant to apply for a writ of cer- [fol. 572] tiorari, I agree that execution and enforcement of the final judgment of this court, dated April 30, 1957, may be stayed for a period of ninety days from date of said final judgment. The order of May 7, 1957, granting stay of execution and enforcement of the judgment grants said stay for a period of eight months. It is my belief that this attempted stay is void *ab initio,* because the time fixed is beyond the statutory period.

The order of May 7, 1957, staying execution and enforcement of the judgment also provides, as follows:

> "This stay is upon the condition that pursuant thereto appellant shall confine any expenditure of funds relating to its Cowlitz Power Project to custodial, safety, security, maintenance and other items for the preservation and protection of the properties of said project and its investment therein, the completion of construction drawings under way relating thereto, the writing up and placing in report form of title searches heretofore begun, the permanent marking of present survey work under way, the negotiation for possible acquisition or relocation of the Mossyrock Game Fish Hatchery of the State of Washington, expenses for assertion and maintenance of its legal and property rights, and the liquidation or settlement of indebtedness incurred for services rendered or materials furnished in connection with said project up to and including April 30, 1957."

The remittitur and judgment of this court having been transmitted to the trial court, it is my considered opinion that the quoted portion of the order of May 7, 1957, is also

void *ab initio,* because this court does not have jurisdiction to grant such relief under the present condition of the record.

Weaver J.

I concur

Schwellenbach, J.

[fol. 573] Praecipe for transcript of record (omitted printed side page 379 ante).

[fol. 574] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 575] SUPREME COURT OF THE UNITED STATES

No. ———, October Term, 1957

THE CITY OF TACOMA, a municipal corporation, Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as DIRECTOR OF FISHERIES, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—July 22, 1957

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 27th, 1957.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 22nd
day of July, 1957.

[fol. 576] SUPREME COURT OF THE UNITED STATES
No. 509, October Term, 1957

[Title omitted]

ORDER ALLOWING CERTIORARI—December 9, 1957

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT, U.S.

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FILED
SEP 27 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 509

THE CITY OF TACOMA, A Municipal Corporation,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

THE CITY OF TACOMA, A Municipal Corporation,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The City of Tacoma prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above entitled case on April 30, 1957.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington (No. 33706), as supplemented by the Court, is reported in the official reports in 49 Wn. 2d

744, 307 P. 2d 567 (1957), (See R. 441-486; 555-557), attached hereto as Appendix A, *infra*, p. 1a.

A prior opinion in the same case is reported in 43 Wn. 2d 468, 262 P. 2d 214 (1953), (See R. 37-61) attached hereto as Appendix B, *infra*, p. 49a.

The related opinion and order of the Federal Power Commission, granting the petitioner the license to construct the dams in question, is reported in 92 Pur. (N. S.) 79 (Fed. Power Commission Opinion No. 221 on Project No. 2016), attached hereto as Appendix C, *infra*, p. 81a. The related opinion of the United States Court of Appeals for the Ninth Circuit, affirming the Federal Power Commission's grant of the license, is reported in 207 F. 2d 391 (9th Cir. 1953), *cert. denied*, 347 U. S. 936 (1954) attached hereto as Appendix D, *infra*, p. 112a.

JURISDICTION

(i) The Judgment of the Supreme Court of the State of Washington is dated and was entered on April 30, 1957 (R. 559), a copy of which is attached hereto together with the judgment of the lower court which was affirmed (R. 320-322) as Appendix E, *infra*, p. 126a.

(ii) Rehearing was denied on April 30, 1957 (R. 558), and a copy of the Court's order is attached hereto as Appendix F, *infra*, p. 131a. By Order dated July 22, 1957, this Court extended the time in which petitioner could file for a writ of certiorari until and including September 27, 1957. Appendix G, *infra*, p. 132a.

(iii) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3).

QUESTION PRESENTED

May a state enjoin construction of a dam and power plant affecting navigable waters of the United States, licensed by the Federal Power Commission, upon the ground that the power of eminent domain conferred by Section 21 of the Federal Power Act upon licensees cannot be exercised by a municipality to condemn lands dedicated by the state to a public use (here as a fish hatchery) within the project reservoir area, absent state legislation specifically conferring such authority?*

In historical perspective, the issue is whether a device to enable a state to veto federal jurisdiction to authorize a project under the Federal Power Act, unsuccessfully sought in various forms in *New Jersey* v. *Sargent*, 269 U. S. 328 (1926); *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940); *First Iowa Hydro-Electric Coop.* v. *Federal Power Com'n*, 328 U. S. 152 (1946); *Iowa* v. *Federal Power Com'n*, 178 F. 2d 421 (8th Cir. 1949), *cert. denied* 339 U. S. 979 (1950); *State of Wash. Dept. of Game* v. *Federal Power Com'n*, 207 F. 2d 391 (9th Cir. 1953), *cert. denied* 347 U. S. 936 (1954); *Wisconsin* v. *Federal Power Com'n*, 214 F. 2d 334 (7th Cir. 1954), *cert. de-*

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* Should certiorari be granted upon the foregoing question, the petitioner requests the privilege of briefing and arguing the following question:

> "Is a state barred from litigating the authority of municipalities to condemn such property where the Federal Power Commission, in license proceedings to which the state was a party, has held that the applicant 'has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project'; and the Federal Circuit Court of Appeals, on the state's petition for review, has sustained the Commission's order and license?"

nied 348 U. S. 883; *Federal Power Com'n* v. *State of Oregon*, 349 U. S. 435 (1955); has now been discovered: namely, acquisition by a state of a few acres in a reservoir area, dedication thereof to a public purpose (such as a highway, fish hatchery, or comfort station), and refusal to sell. This device, if successful in the form asserted here—denial to a municipality of the right of condemnation conferred upon licensees by the Federal Power Act—has an additional facet: the state may thereby veto the preference right of municipalities granted by Section 7 of the Federal Power Act if the project necessitates taking state-owned lands of this character, while leaving undisturbed the same right of eminent domain if asserted against those same lands by a private power company.

STATUTE INVOLVED

The statutory provision involved is Section 21 of the Federal Power Act, 41 Stat. 1074, 16 U. S. C. § 814, which provides as follows:

> Section 21. "When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and

procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000."

STATEMENT OF THE CASE

On December 28, 1948, the City of Tacoma, Washington, filed with the Federal Power Commission an application for a Federal license to construct two power dams on the Cowlitz River in the State of Washington, affecting navigable waters of the United States.*

The Cowlitz River flows south, joining the Columbia River below Portland, Oregon. The Cowlitz project comprises two dams, Mossyrock and Mayfield, with appurtenant power plants and other works. Mossyrock, to be located sixty-five miles upstream from the junction of the Cowlitz and Columbia, comprises a dam to rise five hundred ten feet above bedrock, with a natural reservoir extending upstream twenty-one miles, covering an area of about 10,000 acres. The river's flow, equated by the dam, will pass through a hydroelectric power plant having an initial installation of 225,000 kilowatts and an ultimate potential of 300,000. Mayfield dam, located thirteen and one-half miles downstream from Mossyrock, will rise two hundred forty feet above bedrock, delivering water to

* The Federal Power Commission found that the Cowlitz River was navigable below the site of the proposed dams and that their construction would affect the interests of interstate and foreign commerce.

a power plant with an initial potential of 120,000 kilowatts and an ultimate potential of 160,000, from a reservoir pool of about 2,200 acres extending to the tailwater of the Mossyrock dam. The ultimate combined capacity of the two dams is 460,000 kilowatts.* The project will cost about $135,000,000,** plus $9,465,000*** for devices to enable anadromous fish to pass upstream and their young to return to the sea, and new fish hatcheries. The lower dam, Mayfield, will inundate a state-owned fish hatchery, on a sixty acre tract, worth about $150,000, which would be replaced at Tacoma's expense by a new hatchery about 1,000 feet away from the old location, outside the reservoir but supplied by the same springs. But the State refuses to sell this hatchery or accept a replacement, and denies Tacoma's right to condemn it under the Federal Power Act, thus precipitating the issue here presented.

The Department of Fisheries and Department of Game of the State of Washington, and the State of Washington through its Attorney General were granted leave to intervene in the license proceeding. They asserted that the license should be denied because of injury to anadromous fish, asserted conflict of the project with the laws of Washington, and specifically alleged in their petition:

> "That the reservoirs which would be created by the proposed dams would inundate a valuable and

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* Federal Power Commission Finding 63 (Appendix C, *infra*, p. 104a).

** Federal Power Commission Finding 29 (Appendix C, *infra*, p. 98a).

*** Federal Power Commission Finding 47 (Appendix C, *infra*, p. 102a).

irreplaceable fish hatchery owned by the State of Washington, as well as much productive spawning areas." (Petition, paragraph 9.)

Under date of November 28, 1951, the Power Commission entered its opinion (No. 221) and order issuing the license to petitioner (Appendix C) (R. 436).

The Commission found, *inter alia* (Finding 59, Appendix C, *infra*, p. 104a):

> "Under present circumstances and conditions and upon the terms and conditions hereinafter included in the license, the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes."*

The Commission inserted the following "special condition" in the license:

> "*Article 31.* The Licensee shall construct, maintain and operate such fish ladders, fish traps or other fish handling facilities or fish protective devices and make such stream improvements *and provide such fish hatcheries* and similar facilities and comply with such reasonable modifications of the project structures and operation in the interest of fish as may be prescribed hereafter by the

* The opinion elsewhere (Appendix C, *infra*, p. 81a) states that these two plants, with a combined capacity of 460,000 kilowatts, "would add 190 percent to the present capacity of the Tacoma generating plants and nearly 10 percent to the present combined total installation of 4,700,000 kilowatts in the Pacific Northwest power pool."

Commission upon its own motion or upon the recommendation of the Secretary of the Interior." (Appendix C, *infra*, p. 109a) (Emphasis supplied)*

The Commission made express finding that:

"(53) The Applicant is a municipal corporation; it has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project; and it is a municipality within the meaning of Section 3(7) of the Act." (Appendix C, *infra*, p. 103a)

The State of Washington and its Departments of Fisheries and Game appealed to the United States Court of Appeals for the Ninth Circuit, contending among other things that the City had not complied with certain State laws as required by Section 9(b) of the Act and that the City of Tacoma, as a creature of the State of Washington, could not act in opposition to the policy of the State or in derogation of its laws.

The Ninth Circuit in decision dated October 5, 1953, held that the contentions raised by the State and its Departments of Fisheries and Game were answered by the Supreme Court's decision in *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, 328 U. S. 152 (1946), which rejected any requirements of State law in conflict with the Federal Power Act, which would give the State or State authorities a veto power over the federal project. (See *Wash. Dept. of Game* v. *Federal Power Com'n.*, 207 F. 2d 391; Appendix D,

* The Act of August 14, 1946 (60 Stat. 1080, 16 U.S.C.A. § 661 *et seq.*) requires the Commission to receive the recommendations of the Secretary of the Interior for fish protection.

infra, p. 112a) The Court answered the appellants' "creature" argument by holding that in the *First Iowa* case, the applicant was also a creature of the State and the chief opposition came from the State itself:

> ". . . Yet, the Supreme Court permitted the Applicant to act inconsistently with the declared policy of its creator, and to prevail in obtaining a license." (207 F. 2d at 396; Appendix D, *infra*, p. 120a)

The Ninth Circuit concluded:

> "Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or *bar the licensee from acting under the license to build a dam* on a navigable stream since the stream is under the dominion of the United States."

It then added the following dictum:

> ". . . However, we do not touch the question as to legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. *Questions of this nature* may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them." (207 F. 2d at 396-7; Appendix D, *infra*, p. 121a) (Emphasis supplied)

Certiorari was denied on April 5, 1954. (347 U. S. 936)

In the meantime, subsequent to the Commission's issuance of the license, the City of Tacoma instituted in the State courts on February 3, 1952, the present

action against the Taxpayers of Tacoma and the Directors of Game and Fisheries of the State of Washington, under the provisions of R. C. W. 7.24.010, relating to declaratory judgments, and R. C. W. 7.24.150, providing for testing and determining the validity of a proposed bond issue (R. 1-16). The defendants made no contention that the City lacked authority to issue bonds, but asserted that it was barred from constructing the project because of certain laws of the State of Washington, relating to the protection of fish. The case was decided by the lower court on the pleadings. Cross appeals were taken by both the City and the Departments of Game and Fisheries to the Washington Supreme Court.

The Supreme Court of Washington in a sweeping decision dated October 14, 1953 (First decision, 43 Wn. 2d 468; 262 P. 2d 214 (1953); Appendix B. *infra*. p. 49a), affirmed the position of the City and held the state statutes in question invalid as conflicting with the Federal Power Act, by which Congress exercised its superior powers over navigable waters under the United States Constitution.

To the argument of the taxpayers and the Departments of Game and Fisheries that the City, being a municipal corporation created by the State, may not act under the authority of the Federal laws which are at variance with the laws of the State, its creator,* the court ruled:

> "The Federal Power Act defines the term municipal corporation and authorizes the power com-

* This contention was the basis of the opinion of the dissenting judge and appears to have been adopted by the new majority in the second decision of the Washington Supreme Court, from which this petition of certiorari is sought.

> mission to issue a license to such an entity. Appellant has complied with the state law with respect to the right of a municipality to engage in the business of developing, transmitting and distributing power. Having been granted a license by the power commission, we hold that appellant is at the present time in the same position as any other licensee under the act." (43 Wn. 2d 492, Appendix B, *infra*, p. 74a)

The decision of the lower court was thus reversed and an order remanding the cause thereto was entered.

The City, then believing that all legal questions had been decided, proceeded with preliminary engineering work and called for and let bids awarding the contract for the building of the smaller of the two dams (Mayfield Dam) in the approximate amount of $16,000,000.00 (R. 287). Bonds were sold and construction commenced in compliance with the license.

Thereafter, on August 8, 1955, some three and a half years after the City had filed the action, and almost two years after the decision of the Ninth Circuit, the State of Washington, in its sovereign capacity, was entered as a party defendant to the action (R. 134-135) on motion of the Directors of Game and of Fisheries. The defendants revived the issue of the power of the City as a municipality of the State of Washington to condemn the same state-owned fish hatchery that the State and its Departments of Game and Fisheries had posed as a bar to the granting of a license in the proceedings before the Commission some five years previously.*

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* Defendant's Answer and Cross-Complaint dated and filed August 29, 1955 to City's Amended Complaint (R. 151-160S; Paragraph II, Second Affirmative Defense (R. 153) and Paragraph IV,

In a Judgment entered March 6, 1956, the lower court ruled that it lacked jurisdiction to determine the question as to the City's power of eminent domain, but held that the City was acting illegally and in excess of its authority to construct these dams as they would interfere with public navigation contrary to the statutes of Washington. On this sole ground, the court ordered the City enjoined from spending any sums of money to construct either of the two dams (R. 320-322). From this decision the City again appealed to the Washington Supreme Court, and cross-appeals were taken by the defendants.

The appeal was heard *en banc*, and the opinion in respect thereto is dated and was entered on February 7, 1957 (Appendix A). On April 30, 1957 an "Addition to Opinion" was entered. (This, by the court's direction, appears as the last paragraph of its opinion as published; Appendix A.) In its "Addition" the court decided all issues in the City's favor except those related to the City's power of eminent domain to take the fish hatchery lands in question.

With respect to the issue as to the City's powers of eminent domain, the court below held that it properly had before it the determination of the *power* of the City to condemn the lands in question, even though no condemnation proceedings had been instituted.

The Washington Supreme Court delineated the eminent domain issue into two facets, one of state law, and the other of federal law, as follows: (1) Whether

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Cross-Complaint (R. 154)). The City's Reply denied that the City lacked eminent domain authority under the "laws of the United States" to acquire the lands (Paragraph II, R. 202; Paragraph VII, R. 203-204; Paragraph IV, R. 239).

the City, which was clearly authorized under Washington law to condemn state land for power projects (*Tacoma* v. *State*, 121 Wash. 448, 209 Pac. 700 (1922)), was also authorized to condemn state land which the State has administratively dedicated to a public use (here as a fish hatchery); if not, then (2) "can a municipal corporation be endowed by Federal legislation with power to condemn such lands belonging to the state?" The court after ruling that no state law existed which authorized the City to take state lands dedicated to a public use, then held with respect to the federal question that:

> "The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal Power Act, as we read it, does not purport to do so." (49 Wn. 2d 744, 761; Appendix A, *infra*, p. 20a)

The court distinguished *First Iowa Hydro-Electric Coop.* v. *Federal Power Comm.*, 328 U. S. 152 (1946) and its own earlier decision in *Tacoma* v. *Taxpayers*, 43 Wn. 2d 468 (1953), (Appendix B, *infra*, p. 49a) on the ground that the present matter "does not present a question of *state statutory prohibition;* it presents a question of *lack of state statutory power* in the city."

Based on this ruling, the Washington Supreme Court affirmed the injunction against the City's construction of either of the two dams (R. 559, R. 322; Appendix E, *infra*, p. 126a)

REASONS FOR GRANTING THE WRIT

1. THE PETITIONER HAS BEEN DEPRIVED OF AN IMPORTANT FEDERAL RIGHT ON A QUESTION ARISING UNDER THE FEDERAL POWER ACT NOT PREVIOUSLY DECIDED BY THIS COURT.

The decision of the court below appears to be in conflict with the express intent of Congress, in enacting Section 21 of the Federal Power Act, to give authorized licensees under that Act a federal right of eminent domain where, as here, the Commission has found that the project "is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce." Nothing in Section 21 requires that the Federal licensee shall also have a right of eminent domain under state law to build the Federal project. To the contrary, Section 21, by specifying that only the "practice and procedure" shall conform to that of the state courts where the property is situated, is clear that the substantive right of eminent domain conferred upon the licensee stems from a federal power, independent of the existence or nonexistence of state legislation conferring such a right.

There are at least eleven reported decisions by lower federal courts, none of which were discussed or analyzed by the court below, recognizing that Section 21 of the Federal Power Act confers a *federal* right of eminent domain upon authorized licensees.* This court, however, has never directly decided the point. In *Ford & Son* v. *Little Falls Fibre Company*, 280 U. S. 369 (1930), the question was reserved as follows:

> "... Whether § 21, *giving to licensees the power of eminent domain*, confers on them power to con-

* Cited at page 20, *infra*.

demn rights such as those of respondents, and whether it might have been invoked by the petitioner in the present situation, are questions not before us." (p. 379) (Emphasis supplied)

In *Grand River Dam Authority* v. *Grand-Hydro,* 335 U. S. 359 (1948), the question was also carefully saved by the Court:

". . . The petitioner, likewise, is not seeking to enforce such rights as it might have to condemn this land by virtue of its federal license. Accordingly, we express no opinion upon what would be the appropriate measure of value in a condemnation action brought by the United States or by one of its licensees *in reliance upon rights derived under the Federal Power Act.*" (p. 373) (Emphasis supplied)

Since the court below has denied that the petitioner has any federal right of eminent domain under the Federal Power Act to take the lands necessary for the project, this important question, previously left undecided by this court, is now directly presented.

2. THE DECISION OF THE COURT BELOW PROBABLY CONFLICTS WITH THE OPINION OF THIS COURT IN FIRST IOWA HYDRO-ELECTRIC COOP. v. FEDERAL POWER COM'N, 328 U. S. 152 (1946).

In that case, this Court made a careful analysis of the Federal Power Act with respect to the proper sphere of federal and state powers thereunder. It was concluded there that the Federal Power Act was closely drawn and "resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter." At page 181 of its decision, this Court stated:

> "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.[25]"

In footnote 25, the Court describes the specific provisions to which it refers, listing thereunder:

> "§ 21, federal powers of condemnation vested in licensee . . ."

That a Federal licensee, although established and organized under state law, may exercise powers granted by the Federal Power Act regardless of its granted powers under state law, is also established by the *First Iowa* case. There the applicant was a local cooperative established under the laws of Iowa. Though a creature of the state, the Supreme Court permitted the applicant to act inconsistently with the declared policy of its creator, and to prevail in obtaining a license. Accord, *State of Wash. Dept. of Game* v. *Federal Power Com'n*, 207 F. 2d 391, 396 (9th Cir. 1953), *cert. denied*, 347 U. S. 936 (1954).

As in the *First Iowa* case, to require the Federal licensee to secure from the state the counterpart of the authority it has received from the Federal Power Commission would vest in the state "a veto power over the federal project," and, as said there:

> "Such a veto power easily could destroy the effectiveness of the federal act."

and:

> ". . . It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." (328 U. S. at 164)

3. THE DECISION OF THE SUPREME COURT OF WASHINGTON BELOW IS BELIEVED TO BE NOT IN ACCORD WITH FIVE GROUPS OF DECISIONS BY FEDERAL COURTS, INCLUDING THIS COURT, WHICH WERE NOT DISCUSSED OR ANALYZED BY THAT COURT IN ITS OPINION.

These federal cases establish five principles, which, viewed together as one mosaic, present a clear picture of the federal power asserted here but denied by the court below:

First, the Federal Government acting through its authorized agents has constitutional power under the commerce clause to construct a Federal dam on state-owned land without conforming to state law. See *Arizona* v. *California*, 283 U. S. 423, 451-52 (1931); *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508 (1941). The Federal Power Act (16 U. S. C. A. § 791a, *et seq.*), to the extent that it has been construed by this Court, has been repeatedly upheld as within the plenary power of Congress over navigable waters, and state laws to the extent that they conflict with the Act or give the states a veto right over Federal projects thereunder, are deemed superseded. *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940); *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, 328 U. S. 152 (1946); *Federal Power Com'n.* v. *Oregon*, 349 U. S. 435 (1955).

Second, the right of eminent domain is a sovereign power inherent in the Federal Government when acting pursuant to its Constitutional powers, and may be exercised without the consent of a state. See *Kohl* v. *United States*, 91 U. S. 367 (1876); *Chappell* v. *United States*, 160 U. S. 499, 510 (1896). The fact that the land is already devoted to a public use does not affect or impair this power. *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508 (1941); *United States* v.

Carmack, 329 U. S. 230 (1946); *United States* v. *Gettysburg Elec. R. Co.*, 160 U. S. 668, 685 (1896). In the *Oklahoma ex rel. Phillips* case, this Court upheld the power of the Federal Government, against a direct attack by the State of Oklahoma to condemn state-owned highways, bridges, schools, townships, and a prison farm, to be inundated by the proposed Denison Dam and Reservoir on the Red River authorized by Congress in the Flood Control Act of 1938.

Third, this Court has upheld the power of Congress to grant eminent domain powers to private corporations, endowed with no such powers under state law, in furtherance of interstate commerce. See *Luxton* v. *North River Bridge Co.*, 153 U. S. 525 (1894); *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641, 657-8 (1890). In this respect, the cases make no distinction between private corporations and municipal corporations as grantees. *Latinette* v. *City of St. Louis*, 201 Fed. 676 (7th Cir. 1912); *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (D. C. Ill., 1957); see *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9, 15 (C. C. N. J., 1887); *cf. Green Bay & M. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 68-9, 80 (1898); *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, and *State of Wash. Dept. of Game* v. *Federal Power Com'n.*, cited *supra*, pp. 17-18. In the *Latinette* case, which held that the City of St. Louis could condemn land in Illinois for a bridge over the Mississippi River pursuant to a Federal statute despite the City's lack of eminent domain powers under Illinois law, the court ruled that Congress could select the city as an agency through which a national power could be exercised. The court held:

> "... Nothing in the Constitution forbids the selection of a state corporation as a national agent.

> In reason the material thing is the principal's authority, not the parentage or birth place of the agent." (p. 679)

The same view was stated by Justice Bradley at circuit in *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9 (C. C. N. J., 1887) as follows:

> "In our judgment, if congress itself has the power to construct a bridge across a navigable stream for the furtherance of commerce among the states, it may authorize the same to be done by agents, whether individuals, or a corporation created by itself, or a state corporation already existing and concerned in the enterprise. The objection that congress cannot confer powers on a state corporation is untenable." (p. 15)

In a fairly recent case, not involving eminent domain, this Court, in a unanimous decision, held that under the Interstate Commerce Act the Commission could validly bestow superior federal powers upon a railroad corporation "over and above those bestowed upon it by the state of its creation".* *Seaboard Air Line R. Co.* v. *Daniel*, 333 U. S. 118 (1948). The Court stated:

> ". . . These federally conferred powers can be exercised in the same manner as though they had been granted to a federally created corporation. [citation] Here, just as a federally created railroad corporation could for federal purposes operate in South Carolina, so can this Virginia corporation exercise its federally granted power to operate in that State." (pp. 126-7)

*The functions and powers of the Federal Power Commission are "comparable to those of the Interstate Commerce Commission in the field of transportation", *United States ex rel. Chapman* v. *Federal Power Com'n.*, 345 U. S. 153, 168 (1953).

Fourth, Section 21 of the Federal Power Act entitles duly authorized licensees under the Act, even though public agencies created by the State, to exercise a federal right of eminent domain against property situated within the state, without regard to whether such public agencies are endowed with similar eminent domain powers by state law. See the following cases in the lower federal courts: *Central Nebraska Public Power & Irrig. Dist.* v. *Harrison*, 127 F. 2d 588 (8th Cir. 1942); *Central Nebraska Public Power & Irrig. Dist.* v. *Fairchild*, 126 F. 2d 302 (8th Cir. 1942); *Samuelson* v. *Central Nebraska Public Power & Irrig. Dist.*, 125 F. 2d 838 (8th Cir. 1942); *Burnett* v. *Central Nebraska Public Power & Irrig. Dist.*, 125 F. 2d 836 (8th Cir. 1942); *Central Nebraska Public Power & Irrig. Dist.* v. *Berry*, 124 F. 2d 586 (8th Cir. 1942); *McGinley* v. *Central Nebraska Public Power & Irrig. Dist.*, 124 F. 2d 692 (8th Cir. 1942); *Feltz* v. *Central Nebraska Public Power & Irrig. Dist.*, 124 F. 2d 578 (8th Cir. 1942); *Oakland Club* v. *South Carolina Public Service Authority*, 110 F. 2d 84 (4th Cir. 1940); *Harris* v. *Central Nebraska Public Power & Irrig. Dist.*, 29 F. Supp. 425 (D. C. Neb. 1938); *Grand River Dam Authority* v. *Going*, 29 F. Supp. 316 (D. C. Okla. 1939).

Fifth, Section 21 of the Federal Power Act grants licensees the right of eminent domain over state-owned property dedicated to a public use.

A case closely in point here is the oft-cited leading case of *Missouri* v. *Union Elect. Lt. & Power Co.*, 42 F. 2d 692 (D. C. Mo. 1930). This was an action by the State of Missouri (on behalf of one of its counties) against the Union Electric Light and Power Co., a private utility, which held a license from the Federal Power Commission under the Federal Power Act to

build a dam on the navigable Osage River, to enjoin its construction. The licensee had no capacity or power under Missouri law to condemn state land, dedicated to a public use. The court found that:

> "The evidence was undisputed that the dam, as proposed by the defendant Union Electric Light & Power Company, would have the effect to accumulate a vast body of water in a huge reservoir, and that the entire region within the valley of the Osage river and the valleys of its tributaries, for a distance of more than 100 miles, would be overflowed. This would result in submerging both public and private property, including the courthouse and jail in the village of Linn Creek, a large number of school districts, and at sundry points inundate the public highways . . ." (p. 694)

The court cited Section 21 of the Act, concluding that:

> "The licensee has been granted the power to acquire property by the exercise of eminent domain in express terms. . . .
>
> * * * * * * * *
>
> "In this connection it cannot be questioned but that the Congress had the power to confer the right of eminent domain upon the defendant Union Electric Light & Power Co." (p. 698)

With respect to the issue as to whether public property dedicated to a public use may be taken by the licensee, the court held:

> ". . . To deny the right of eminent domain as against this public property would not only defeat the functions of the national government, but would run contrary to the obvious intent of the Congress as expressed in the Water Power Act." (p. 698)

Other federal decisions closely analogous that cannot be reconciled with that of the Supreme Court of Washington below are *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (D. C. Ill., 1957) and *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9 (C. C. N. J. 1887). The *City of Davenport* case held:

> "... If the State of Illinois or the City of Moline could supersede or prevent the exercise of this power of eminent domain it would be impossible to construct the authorized improvements. The inability of the States so to condition a right granted by Congress within its constitutional powers has often been made clear by both federal and state courts." (p. 797)

4. CLEARLY THE QUESTION IS OF IMPORTANCE NOT ONLY WITH RESPECT TO THE PARTICULAR PROJECT HERE INVOLVED BUT WITH REGARD TO THE RELATIVE POWERS OF THE STATES AND FEDERAL GOVERNMENT TO CONTROL THE CONSTRUCTION OF FEDERALLY AUTHORIZED PROJECTS ON NAVIGABLE STREAMS UNDER THE FEDERAL POWER ACT.

If the decision of the court below is permitted to stand, the states will have at their finger tips an easy method to veto practically any Federal project licensed to a public agency under the Federal Power Act. The ownership of lands under or adjacent to navigable streams by the various states is commonplace. *Cf. United States* v. *Utah*, 283 U. S. 64, 75 (1931). Control of a few acres in a reservoir area may be as effective a key to construction of a project as control of the damsite itself. Compare *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956), with *Arizona* v. *California*, 283 U. S. 423 (1931). If no lands in the reservoir area are owned by the State, they could be easily purchased and dedicated to a "public use" of some kind.

Hence the states by the manipulation of their state lands, or their eminent domain laws, will have an easy way to avoid the result of this Court's decisions in *First Iowa Hydro-Electric Coop.* v. *Federal Power Com'n.*, 328 U. S. 152 (1946), and *Federal Power Com'n.* v. *State of Oregon*, 349 U. S. 435 (1955). *Cf. New Jersey* v. *Sargent*, 269 U. S. 328 (1926); *Iowa* v. *Federal Power Com'n.*, 178 F. 2d 421 (8th Cir. 1949), *cert. denied*, 339 U. S. 979 (1950).

". . . In such matters there can be no divided empire." *Green Bay & M. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 80 (1898).

Inasmuch as the decision below and its rationale apply only to licensees which are public agencies of a state, then the way is open for one state official or agency which is opposed to the congressional policy of preference to public bodies expressed in Section 7 of the Federal Power Act (16 U. S. C. A. 800) to block all development by municipalities of that state in favor of private power companies.

The City of Tacoma is one of the oldest public power agencies in the United States, having been established in 1893. It is granted broad powers under state law to condemn lands for power projects, including state lands, *Tacoma* v. *State*, 121 Wash. 448, 209 Pac. 700 (1922), or lands held by a private power company dedicated to the public use for a power project, *Tacoma* v. *Nisqually*, 57 Wash. 620, 107 Pac. 199 (1910). If, notwithstanding Tacoma's broad powers thus adjudicated, the State can block Tacoma from proceeding with the present project under its federal license by administratively dedicating some small portion of State property in the reservoir area to some public use, then *a fortiori* the functioning of the Federal Power Act in any state can be thwarted.

CONCLUSION

For the reasons stated, it is believed that the decision of the court below poses fundamental issues regarding the proper sphere of federal and state powers with respect to projects for the development of the Nation's water-power resources authorized and licensed under the Federal Power Act, that the decision was wrong on the merits, and that this petition for a writ of certiorari to review that decision should be granted.

Respectfully,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 509

THE CITY OF TACOMA, A Municipal Corporation,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State,
Respondents.

APPENDIX

TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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APPENDIX A

(No. 33706. *En Banc.* February 7, 1957.)

THE CITY OF TACOMA, *Appellant*, v. THE TAXPAYERS OF TACOMA *et al.*, *Respondents and Cross-Appellants.*[1]

Cross-appeals from a judgment of the superior court for Thurston county, No. 26572, Wright, J., entered November 6, 1956, upon findings in favor of the defendants, in an action brought under the declaratory judgment act to determine a city's right to issue and sell certain utility bonds and for injunctive relief, tried to the court. Affirmed.

E. K. Murray, Marshall McCormick, and *Frank L. Bannon* (*Robert R. Hamilton* and *James F. Henriot*, of counsel), for appellant.

Lynch & Lynch, for respondents and cross-appellants taxpayers.

The Attorney General, Joseph T. Mijich and *E. P. Donnelly, Assistants*, for respondents and cross-appellants Schoettler *et al.*

A. C. Van Soelen, Glen E. Wilson, and *Frank P. Hayes, amici curiae.*

WEAVER, J.—This action was instituted by the city of Tacoma against the taxpayers of Tacoma and the directors of game and fisheries of the state of Washington, pursuant to the declaratory judgment act (RCW 7.24.010, *et seq.*) and RCW 7.24.150, *et seq.*, to test and determine plaintiff's right to issue and sell certain utility revenue bonds to finance the construction of two power dams on the Cowlitz river in Lewis county.

The action was commenced in Pierce county; later, by stipulation and order of court, it was transferred to Thurston county.

[1] Reported in 307 P. (2d) 567.

The case was here on a prior appeal. *Tacoma v. Taxpayers*, 43 Wn. (2d) 468, 262 P. (2d) 214 (1953). This court reversed the judgment of dismissal entered by the trial court after sustaining defendant taxpayers' demurrer to the original complaint. (We refer to that decision for an understanding of the material facts involved on the first appeal.)

The case was remanded to the superior court for further proceedings in accordance with the views therein expressed.

Preliminary to a discussion of the merits of this case, we point out that the city of Tacoma was granted a license by the Federal power commission, after hearings held in 1951, to construct the two dams on the Cowlitz river. The state of Washington, represented by the attorney general; the directors of game and fisheries, cross-appellants; and Washington State Sportsmen's Council, Inc. (not a party to the present case), were given notice of the hearings and appeared before the Federal power commission and actively participated in that proceeding. The parties petitioned the court of appeals for the ninth circuit to review the decision of the Federal power commission (*In the Matter of the City of Tacoma, Washington, Project No. 2016*); the commission's decision was affirmed. *State of Washington Department of Game v. Federal Power Comm.*, 207 F. (2d) 391 (C. A. 9th; 1953), cert. den. 347 U. S. 936, 98 L. Ed. 1087, 74 S. Ct. 626 (1954).

The proceedings in the superior court, between October 14, 1953, the date the remittitur of this court was filed, and March 6, 1956, the date of the final judgment from which the present appeal and cross-appeal are taken, are set forth in the lengthy transcript on appeal. It would unduly extend this opinion to give a resume of the various pleadings, motions, and orders.

After our former opinion, the trial court entered an order overruling taxpayers' demurrer to the complaint. The tax-

payers of Tacoma filed an answer and cross-complaint, denying that the Federal license had any legal force or effect, and affirmatively alleged that the city had exceeded its authority under the state statutes. The city's demurrer was sustained to the cross-complaint.

April 29, 1954, the directors of game and fisheries filed a second amended answer and cross-complaint that, in substance, was similar to prior pleading, except they alleged, for the first time, that the Cowlitz river is nonnavigable at the dam sites.

April 29, 1954, the city of Tacoma filed a petition praying that attorneys' fees as costs be fixed and determined, and that the city's liability for further legal services be terminated in accordance with the provisions of the declaratory judgment act. The petition stated that nothing further remained to be done by the taxpayers of Tacoma, except to establish the allegations of the complaint (if denied) and enter judgment. The prayer requested that the taxpayers be denied costs for attorneys' fees in connection with their cross-complaint.

On the same date, the taxpayers of Tacoma answered. They said they had done all that was expected of them; that they had filed an answer and cross-complaint, because it was the only further step they could take; and that they should be allowed costs and attorneys' fees.

April 29, 1954, the superior court entered an order absolving the taxpayers from any further defense or prosecution of the action. Subsequently, the superior court fixed the amount of attorneys' fees to be paid by the city to the taxpayers.

June 24, 1955, the directors of game and fisheries filed a motion for a temporary restraining order and injunction, *pendente lite*, to enjoin further development and construction of the Cowlitz project and the sale of the proposed bond issue. The affidavit of an assistant attorney general,

filed in support of this motion, alleges that a large portion of certain state highways would be inundated and must, of necessity, be condemned; and that

"Ordinance No. 14386 authorizes the condemnation of the state game hatchery, known as the Mossyrock Hatchery, located on the Cowlitz River. This hatchery is located on Government Lots 4, 7, 8, and 9, Section 11, Township 12 North, Range 2 East Willamette Meridian, in Lewis County, Washington. The state also has a water right there. The reservoir created by the Mayfield Dam will inundate and overflow the entire hatchery. This hatchery site has been segregated from the public domain and already appropriated to a public use.

"The City of Tacoma, being a limited arm of the state government, cannot condemn property such as this already dedicated to a public use. *State v. Superior Court*, 91 Wash. 454, 157 Pac. 1097 (1916). Therefore, the ordinance authorizing such condemnation is invalid and the City is proceeding contrary to the laws of the State of Washington. Affiant alleges that no agreement between the City of Tacoma and State authorities has been reached, and that legislative action will be necessary before Tacoma can build the project. There has been no such legislative action as yet.

"On June 21, 1955, the City of Tacoma awarded bids for the purchase of Tacoma city Light revenue bonds, totalling $15,000,000, to pay for the construction of part of the Mayfield Dam. Affiant is informed and believes that the City will deliver said bonds to the purchasers in the immediate future; on June 22, 1955, the City of Tacoma awarded the contracts for the construction of the Mayfield Dam, and the City intends to authorize the commencement of said construction in the immediate future.

"Affiant is informed and believes that if the threatened acts of the plaintiff in delivering the bonds and commencing construction of the Mayfield Dam are not enjoined pending the outcome of this action, irreparable injury will result to the State of Washington in that part or all of the fish runs in the Cowlitz River will be destroyed for which adequate damages cannot be ascertained. Also, if invalid bonds are permitted to be on the market, the public will suffer and it

is the responsibility of the State of Washington to prevent this."

On the filing of this motion and affidavit, the superior court, *ex parte*, issued a temporary restraining order and order to show cause. It enjoined the city from directly or indirectly developing, constructing, or contracting for the construction of the two dams; from delivering or permitting the sale of any bonds for the payment of costs of the Cowlitz project; and ordering the respective parties to appear at a hearing on the matter on August 8, 1955.

June 28, 1955, the city of Tacoma, appellant, filed a motion to quash and dissolve the temporary restraining order. It was supported by affidavits that stated in substance: (a) that the action had been pending for more than two years; (b) that during this time the directors of game and fisheries had known that the city contemplated calling for bids on contracts and the sale of bonds; (c) that for the past year this action had awaited the ruling of the superior court upon the city's demurrer to the directors' second amended cross-complaint; (d) that the protection of fish in the Cowlitz river was a matter for presentation before the Federal power commission; (e) that all matters proper for determination herein had been decided by the supreme court of this state upon the first appeal. (*Tacoma v. Taxpayers, supra*); (f) that the judgment in the case entitled *State of Washington Department of Game v. Federal Power Comm., supra*, was *res judicata* as to all other matters pleaded by the directors of game and fisheries in their second amended answer and cross-complaint; (g) and, that the continuation of the temporary restraining order would result in irreparable damage to the city of Tacoma. A hearing on the motion to quash was set for June 30, 1955. July 7, 1955, the court modified the temporary restraining order to read:

". . . Plaintiff (appellant) and its officers and agents be and they are hereby restrained and enjoined from doing

any act or thing in any manner interfering with the bed or waters of the Cowlitz River in connection with its Mayfield and Mossyrock Dam Projects, or in any way injurious to the fish runs or fish resources of said river. . . ."

July 27, 1955, the city filed an amended complaint. July 29, 1955, the directors of game and fisheries moved to *substitute* the sovereign state of Washington as a defendant in this action. The affidavit, in support of this motion, alleged:

"The proposed project will affect lands, structures, waters, and fish, the ownership and jurisdiction over which is in the State of Washington *and not in the above-named defendants* (directors of game and fisheries); and, therefore, the real party in interest, of this action, which will be affected by the decision of this Court is the State of Washington."

Over objection of the city, August 8, 1955, the court entered an order granting permission "to add the State of Washington as a party defendant herein . . ."

August 29, 1955, the directors of game and fisheries and the state of Washington filed an answer and cross-complaint to the city's amended complaint. They alleged: (a) that the Cowlitz project would interfere with *public navigation* on the Cowlitz river, which the city is prohibited from doing under the provisions of RCW 80.40.010; (b) that appellant had not obtained an extension of time beyond December 31, 1955, to commence construction; (c) *that the proposed Cowlitz project would damage and destroy state lands dedicated to a public use that the city of Tacoma, as a municipal corporation, is unable to acquire;* (d) that the city had not complied with the provisions of RCW 90.28.010 (permission to inundate state highways), and RCW 90.20.010, *et seq.* (water appropriation permit); (e) and, that the city had attempted to circumvent state laws by commencing an action in Federal district court at Tacoma. (The city states in its brief that it voluntarily dismissed this action.)

September 27, 1955, the directors of game and fisheries and the state of Washington filed a joint amended answer and cross-complaint. It contained, substantially, the same matters as the directors' prior pleading, except that the various parcels of state land devoted to public uses were described by legal description. There was an added allegation and exhibit which, in substance, indicated that the state game commission had passed a resolution August 16, 1955, instructing the director of game to take every legal procedure to resist any effort of the city to condemn or in any manner acquire the Mossyrock fish hatchery, because it was irreplaceable.

October 7, 1955, the trial court entered a restraining order *pendente lite*. It modified the temporary restraining order of July 7, 1955, by inclusion of the following proviso:

". . . PROVIDED HOWEVER, that the plaintiff, its agents, employees and officers, be and they are hereby authorized to construct the coffer dam for the powerhouse site and to do blasting necessary to construction, Provided that no blasting shall take place in the waters of the Cowlitz River."

October 11, 1955, the trial court entered an order, over objection of the city, appointing new attorneys to represent "all taxpayers of the City of Tacoma." The taxpayers, theretofore appointed, had withdrawn from the proceeding and had defaulted within the provisions of the declaratory judgment act.

November 30, 1955, the newly appointed attorneys, upon behalf of all taxpayers, filed an answer and affirmative defense to the city's amended complaint. It contained virtually the same allegations as the amended answer and cross-complaint of the directors and the state of Washington.

January 3, 1956, the parties filed a pretrial conference stipulation and order. It stated: (a) that the city had en-

tered into contracts for the construction of the Mayfield dam, and that construction had been commenced; (b) that two ordinances, amendatory of ordinance No. 14386, had been passed; (c) that a license to build the dams had been issued appellant by the Federal power commission; (d) *that completion of the dams and closing of the gates would inundate a large portion of a fish hatchery, owned and operated by the state, as well as other state land, as described in the pleadings;* (e) that the directors of fisheries and game, if permitted, would show probability of injury to fish; (f) that the city had not yet obtained permission to inundate state highways, under the provisions of RCW 90.28.010, but that plans had been submitted for review to the director of highways; (g) that the city had used and would continue to use surplus funds of its light utility to pay costs of the Cowlitz project, and would issue and sell revenue bonds of its light utility therefor.

January 5, 1956, the trial judge wrote a letter to counsel. We quote, in part:

"After reading briefs the Court feels that testimony can be limited to the question of navigation. . . .

"Upon the question of damage to fish the Court is of the opinion that the decision of the Federal Power Commission and the decision of the Supreme Court of this state are controlling.

"Upon the question of relocation of the fish hatchery, the Court is of the opinion that only a question of law is presented. The question of law will relate to the extent of the powers of condemnation given to plaintiff under the license from the Federal Power Commission."

The case was tried January 11, 1956, upon the city's *amended* complaint, the taxpayers' answer and affirmative defense, and the directors' and state's amended answer and cross-complaint, as limited by the stipulation and the above-quoted letter. Findings of fact and conclusions of law were

made; judgment was entered March 6, 1956. The trial court declared the status of the parties to be as follows:

"It Is Hereby Ordered, Adjudged And Decreed that the question of the capacity of the plaintiff to acquire property of the defendant, State of Washington, by eminent domain is not within the jurisdiction of this court,

"It Is Further Ordered, Adjudged And Decreed that the question of damage to fish which might result from construction of plaintiff's Cowlitz Project was passed upon by the Federal Power Commission and the Federal Courts and is not now a proper one for consideration by this Court.

"It Is Further Ordered, Adjudged And Decreed that Sections 27 and 36, Chapter 117, Laws of 1917, as amended (R. C. W. 90.20.010 and 90.28.060) are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.

"It Is Further Ordered, Adjudged And Decreed that the provisions of Chapter 9, Laws of 1949, (R. C. W. 75.20.010 et seq.), and Sections 46, and 49, Chapter 112, Laws of 1949, as amended (R. C. W. 72.20.050 [sic] and 75.20.100), are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State Officials to exercise a veto over said project.

"It Is Further Ordered, Adjudged And Decreed that the plaintiff is acting illegally and in excess of its authority in the construction of the Mayfield and Mossyrock hydroelectric project as presently proposed for the reason that said project *would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of R. C. W.* 80.40.010 *et seq.*

"It Is Further Ordered, Adjudged And Decreed that the injunction pendente lite, entered October 7, 1955, be continued in effect until July 1, 1956, from and after which later date, plaintiff is hereby enjoined from spending any sums of money relating to the Mayfield and Mossyrock hydroelectric project." (Italics ours.)

June 28, 1956, the chief justice continued the injunction *pendente lite*.

The city of Tacoma (appellant) has made fifteen assignments of error. The taxpayers of Tacoma, the directors of game and fisheries, and "The State of Washington, a Sovereign State" (respondents and cross-appellants) have made two assignments of error on their cross appeal.

Although this action has evolved into a Hydra-headed controversy, a single question at its nucleus is determinative of its disposition.

Does a municipal corporation, created by the state as a subordinate unit, have the power to condemn state lands held in a governmental capacity and previously dedicated to a public use; and if not, can a municipal corporation be endowed by Federal legislation with power to condemn such lands belonging to the state?

This question is neither abstract nor academic. The state-owned Mossyrock fish hatchery and the land necessary for its operation, which are of substantial value, will be inundated by the proposed dam. In the sense that the question requires a definition of the powers of the sovereign state and one of its created agencies, the problem is a local one peculiarly within the province of the courts of this state; hence, assuming, *arguendo*, that the question was before the court of appeals for the ninth circuit in *State of Washington Department of Game v. Federal Power Comm.*, *supra* (an erroneous assumption, as we point out later in this opinion), it is not *res judicata* against the state of Washington.

This precise question is presented to us by cross-appellants' (the taxpayers, the directors, and the state) first assignment of error, which reads as follows:

"The court erred in making and entering its conclusion of law No. III and in entering its judgment, dated March 6, 1956, insofar as it included therein paragraph I reading:

" 'IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the question of the capacity of the plaintiff to acquire property of the defendant, State of Washington, by eminent domain *is not within the jurisdiction of this court.*' " (Italics ours.)

The city (appellant and cross-respondent) argues that this question is not before us. Two reasons are given: first, that the taxpayers of Tacoma (respondents and cross-appellants) are precluded by the law of the case as declared on the first appeal to this court; and second, that Robert Schoettler, as director of fisheries, and John A. Biggs, as director of game of the state of Washington, and "The State of Washington, a Sovereign State" (respondents and cross-appellants) are bound by the doctrine of *res judicata*.

In support of these reasons, our former opinion in this case (*Tacoma* v. *Taxpayers, supra*) and the opinion of the United States court of appeals in *State of Washington Department of Game* v. *Federal Power Comm., supra*, are cited, analyzed, and discussed.

If the state of Washington, in its sovereign capacity, is not bound by the theory advanced by the city, we reach the question of the city's power to condemn state lands previously dedicated to a public use. The position of the remaining parties, and the other assignments of error, would not require examination.

We are inclined to the view that the theory advanced by the city does not apply to the taxpayers of Tacoma nor to the directors of game and fisheries. This is based upon the following: (a) in our former decision, the sole question before this court was whether the city's *first* complaint stated a cause of action; (b) neither our former opinion nor the opinion of the Federal court of appeals discussed the question of the city's power and capacity to condemn state-owned property previously dedicated to a public use—in fact, the latter opinion excludes the question; (c) the question did not appear until pleaded *after* we had remanded the case to the trial court; (d) the case is now before us

after *trial* of issues formed by the city's *amended* complaint, filed July 27, 1955, and the answers, affirmative defenses, and cross-complaints thereto.

Since we base our conclusion that the trial court should be affirmed upon other grounds, we do not deem it necessary to expand our reasons for concluding that the taxpayers of Tacoma and the directors of game and fisheries are not precluded by the law of the case and the doctrine of *res judicata*.

The state of Washington, in its sovereign capacity, is not bound by the doctrine of *res judicata* (assuming, *arguendo*, that the issue involved has been before a court of competent jurisdiction), for the manifest reason that *the state was not a party to this action* at the time our former decision was rendered.

The state of Washington became a party defendant by order of court, entered August 8, 1955. The order was entered on motion of the directors of fisheries and game, supported by an affidavit, the allegations of which we quoted *supra*.

An attempt is made to avoid the conclusion that the state did not become a party to this action until August 8, 1955, upon the authority of *State* v. *Pacific Tel. & Tel. Co.*, 9 Wn. (2d) 11, 113 P. (2d) 542 (1941). We do not find the case apposite.

We have not overlooked the fact that the state-owned land involved is not in Pierce county, where this action was commenced, nor in Thurston county, to which this action was transferred by stipulation and order of court; but this is *not* a condemnation action. It involves a determination of the *power to condemn*, not the actual condemnation. In *Donaldson* v. *Greenwood*, 40 Wn. (2d) 238, 250, 242 P. (2d) 1038 (1952), we quoted with approval:

" 'A state can exercise through its courts jurisdiction to order or to forbid the doing of an act within the state, al-

though to carry out the decree may involve doing an act or affecting a thing in another state. 'Restatement, Conflict of Laws, 147, § 97.''

A fortiori, since the parties and the issue were before the superior court of Thurston county, it had jurisdiction to resolve the question of the power of the city to condemn state-owned lands. In this respect, the trial court erred in the first paragraph of its decree, quoted *supra*, in which it said that

". . . the question of the capacity of the plaintiff to acquire property of the defendant, State of Washington, by eminent domain is not within the jurisdiction of this court."

In *Pacific Tel. & Tel. Co.* v. *Henneford*, 195 Wash. 553, 81 P. (2d) 786 (1938), the plaintiff company secured an injunction against the state tax commissioner, enjoining him from collecting a certain use tax. Three years later, the state commenced an action against the company to recover the same tax. In *State* v. *Pacific Tel. & Tel. Co.*, *supra*, this court held that the first action was *res judicata* of the second, saying:

"This court has held that, where an action is brought by or against the officers of a state which affects the right of the state *to collect its revenue*, it is, in effect, an action by or against the state. [Citing cases.]" (Italics ours.)

Thus, the court limited its decision to the particular facts before it; namely, the collection of revenue. Finally, the court announced the guide to be followed when it said:

"The general rule is that a judgment for or against the state or an officer or agency thereof *in matters as to which such officer or agency is entitled to represent the state in litigation*, is conclusive for or against the state. . . .

"The test as to whether a judgment in a prior action brought against officers of the state is *res judicata* as against the state in a second action involving the same subject-matter, *depends upon whether the officers have*

authority to represent the interests of the state in the prior action. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 84 L. Ed. 1263, 60 S. Ct. 907." (Italics ours.)

The departments and directors of fisheries and game are charged with the duty of enforcing state laws, and rules and regulations of the departments relative to the conservation of food fish and game fish. The directors have statutory authority to represent and bind the state by their actions, only in matters relating to the conservation of food fish and game fish. Under the statutes, their sole concern is the conservation of food fish and game fish; they are not concerned with ownership of lands by the state in its sovereign capacity.

"The State does not legally become a party to a suit brought on its behalf unless the suit is brought by some officer having statutory authority so to do and a suit brought by the State Tax Collector, which he had no statutory authority to bring is not binding on the State, and the decree therein is not res adjudicata against the State." *State* v. *Rogers*, 206 Miss. 643, 39 So. (2d) 533 (1949).

In *People* v. *Birch Securities Co.*, 86 Cal. App. (2d) 703, 196 P. (2d) 143 (1948), the court said:

"It will be observed the former federal judgment, which was offered in evidence as a bar to this action, was merely against certain named officers of the state, as such, and not against the State of California. That case was not a suit against the State of California, and is therefore not res judicata in this action or an estoppel against the state maintaining this action for unpaid franchise taxes. *When a suit is brought only against individually named officers of a state, as such, it is ordinarily not an action against or binding upon the state.*" (Italics ours.)

The state became a party defendant to this action on August 8, 1955, subsequent to the first appeal; hence, neither the doctrine of the law of the case, as purportedly established by our first opinion, nor the doctrine of *res*

judicata applies to the state of Washington, and this court must consider the question posed.

In a recent *En Banc* decision (*State ex rel. Eastvold* v. *Yelle*, 46 Wn. (2d) 166, 168, 279 P. (2d) 645 (1955)), this court said:

"The power of eminent domain is inherent in sovereignty and does not depend for its existence on a specific grant in the constitution. The provisions found in a state constitution do not by implication grant the power to the government of a state, but limit a power which otherwise would be without limit. *State ex rel. Eastvold* v. *Superior Court*, 44 Wn. (2d) 607, 609, 269 P. (2d) 560 (1954)."

In *Lauterbach* v. *Centralia*, 149 Wash. Dec. 528, 532, 304 P. (2d) 656 (December 5, 1956), we again defined a municipal corporation and described its powers as follows:

"A municipal corporation is a body politic established by law as an agency of the state—partly to assist in the civil government of the country, but chiefly to regulate and administer the local and internal affairs of the incorporated city, town, or district. *Columbia Irr. Dist.* v. *Benton County*, 149 Wash. 234, 235, 270 Pac. 813 (1928). *It has neither existence nor power apart from its creator, the legislature*, except such rights as may be granted to municipal corporations by the state constitution." (Italics ours.)

"A municipal corporation does not have an inherent power of eminent domain. It may exercise such power only when it is expressly authorized to do so by the *state legislature*." *Tepley* v. *Sumerlin*, 46 Wn. (2d) 504, 507, 282 P. (2d) 827 (1955), and cases cited. This is consistent with the general proposition that

". . . a municipal corporation, being but a creature of the state, derives its existence, powers, and duties *from the legislative body* of the state. 37 Am. Jur. 620, § 4, and p. 626, § 7. 2 McQuillin, Municipal Corporations (3d ed.) 12, § 4.04; 578, § 10.03." *Othello* v. *Harder*, 46 Wn. (2d) 747, 752, 284 P. (2d) 1099 (1955). (Italics ours.)

Of course, by statute, the state may delegate the power of eminent domain to one of its political subdivisions; but such statutes are strictly construed. Lewis in 1 Eminent Domain (3d ed.) 679, § 371, states:

"The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. When the right to exercise the power can only be made out by argument and inference, it does not exist. *'There must be no effort to prove the existence of such high corporate right, else it is in doubt; and, if so, the State has not granted it.'*" (Italics ours.)

This is cited with approval in *State ex rel. Chesterly v. Superior Court*, 19 Wn. (2d) 791, 800, 144 P. (2d) 916 (1944).

It follows, that the state may delegate, to one of its political subdivisions, the power to condemn state-owned property. However,

". . . the principal question that arises in connection with the right of a particular subdivision or agency to take state-owned lands is whether the legislature has authorized such subdivision or agency so to do. This is, of course, a problem of statutory construction, and it may be said in this connection that there is a clear tendency on the part of the courts against interpreting governing statutory provisions in favor of the existence of such authorization *in the absence of a clear expression of the legislative intention to that effect*. This tendency is attributable to such considerations as the general principal of statutory construction that where a statute is general in its terms and thereby any prerogative, right, title, or interest is taken from the state, the latter is not bound unless the statute is made to extend to it by express words; the general rule that property devoted to a public use may not be taken under the power of eminent domain for an inconsistent use unless the right to do so is conferred expressly or by necessary implication." (Italics ours.) Annotation: "Eminent domain: power of one governmental unit or agency to take property of another such unit or agency." 91 L. Ed. 221, 259 (1947).

In *State* v. *Superior Court*, 91 Wash. 454, 157 Pac. 1097 (1916), this court held that a statute authorizing railroad corporations to condemn lands, including lands granted to the state, refers to state lands held only in a proprietary capacity, and does not include state lands segregated from the public domain and appropriated to a public use by dedication, saying:

"Indeed, if this be not the rule, the legislature has, by the act in question, granted to railway companies power to condemn any of the state lands for railway purposes (save that of course which is specially exempted), which would include the lands on which its capitol buildings are situated." (p. 459)

The following remark made by this court in *Seattle & Montana Ry. Co.* v. *State*, 7 Wash. 150, 152, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217 (1893), is pertinent:

"As well might it be contended that because a railroad is authorized to enter upon and condemn 'any' land for its tracks, depots, shops, round houses, etc., it could, by serving notice upon the auditor of Thurston county, take the entire ten acres upon which the state capitol stands for a depot and shops." (p. 152)

In *State ex rel. Attorney General* v. *Superior Court*, 36 Wash. 381, 385, 78 Pac. 1011 (1904), this court said:

"Since the rule prevails that condemnation statutes must be strictly construed, as far as they relate to the taking of private property, it follows, with even more force, that the same rule must apply where the lands of the sovereign are sought to be taken." (p. 385)

We deem it conclusively settled in this jurisdiction that a municipal corporation or a public corporation does not have the power to condemn state-owned lands dedicated to a public use, unless that power is clearly and expressly conferred upon it by statute.

After a careful review of RCW 8.12.030 and RCW 80.40.010, and other statutes to which our attention has

been directed, we do not find that the legislature has expressly authorized a municipal corporation to condemn state-owned land previously dedicated to a public use; hence, we conclude that the city of Tacoma has not been endowed with the statutory capacity to condemn such lands.

There remains the subsidiary question: can a municipal corporation of this state be endowed, by Federal legislation, with power to condemn state-owned lands previously dedicated to a public use, in the absence of power and capacity so to act under state statutes; or, specifically, can the city of Tacoma receive the power and capacity to condemn state-owned lands previously dedicated to a public use, from the license issued to it by the Federal power commission in the absence of such power and capacity under state statutes?

This is not a question of the right of the Federal government to control all phases of activity on navigable streams, nor a question of its power, under the Federal power act, to delegate that right. It only questions the capacity of a municipal corporation of this state to act under such license when its exercise requires the condemnation of state-owned property dedicated to a public use.

The question of the legal capacity of the city of Tacoma to act under the license issued by the Federal power commission is specifically excluded from consideration in *State of Washington Department of Game* v. *Federal Power Comm.*, *supra*. The court said:

"Consistent with the *First Iowa* case, *supra*, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensees from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States. However, *we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted.* There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by

the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them." (p. 396) (Italics ours.)

Hence, this case is not *res judicata* against the state of Washington. As we have heretofore pointed out, the city does not have the capacity to act under the license. Its inability to act, in the manner which we have discussed, is inherent in its very nature. *Its inability so to act can be remedied only by state legislation that expands its capacity.*

We find nothing inconsistent with this conclusion in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Comm.*, 328 U. S. 152, 90 L. Ed. 1143, 66 S. Ct. 906 (1946). Therein, the court held (rightfully, we believe) that a state could not, by statute, require the petitioner to secure a state permit to build the dam *when the subject matter of the state statutory prohibitions was exclusively within the jurisdiction of the Federal government.* The court said:

"To require the petitioner to secure the actual grant to it of a state permit under § 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." (p. 164)

In *Tacoma* v. *Taxpayers*, 43 Wn. (2d) 468, 489, 262 P. (2d) 214 (1953), this court said:

"It [the Federal government] intended to exercise its full jurisdiction to authorize the power commission to supersede *state laws purporting to prohibit or limit the construction of dams* on navigable streams." (p. 489) (Italics ours.)

In the instant case, the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition;* it presents a question of *lack of state statutory power* in the city. It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the state of Washington.

The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal power act, as we read it, does not purport to do so.

If it be held that the Federal government may endow a state-created municipality with powers greater than those given it by its creator, the state legislature, a momentous and novel theory of constitutional government has been evolved that will eventually relegate a sovereign state to a position of impotence never contemplated by the framers of our constitutions, state and Federal.

In our review of this case under the declaratory judgment statute (RCW 7.25.010), we are limited in our consideration by the plan of construction established by the ordinances of the city of Tacoma and the license of the city of Tacoma received from the Federal power commission, as they appear in the record before us. It is not within the province of this court to give an advisory opinion as to what the law may be under a different plan of construction, which may be established by different ordinances or licenses.

Based upon the present record, we agree with that portion of the judgment of the trial court which determines (1) that the question of damage to fish which might result from construction of the dams is not now a proper one for the consideration of the court; and (2) that Laws of 1917, chapter 117, §§ 27 and 36, pp. 459, 463, as amended (RCW 90.20.010—state permit for appropriation of water; RCW 90.28.060—state permission to build a dam), Laws of 1949,

chapter 9, p. 38 (RCW 75.20.010 *et seq.*—establishing Columbia river fish sanctuary), and Laws of 1949, chapter 112, §§ 46 and 49, pp. 272, 274, as amended (RCW 75.20.050—state permit to divert water; RCW 75.20.100—approval of building plans for the protection of fish), are

". . . inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project."

Our conclusion is amply supported by *First Iowa Hydro-Electric Cooperative* v. *Federal Power Comm.*, 328 U.S. 152, 90 L. Ed. 1143, 66 S. Ct. 906 (1946).

The same authority supports the conclusion that the trial court erred when it issued the injunction

". . . for the reason that said project would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of R.C.W. 80.40.010 et seq."

However, we have held on many occasions that if the judgment of the trial court is based upon erroneous grounds, it will be sustained, if correct on any grounds within the pleadings and established by the proof. *Ennis* v. *Ring*, 149 Wash. Dec. 279, 283, 300 P. (2d) 773 (1956).

We have already held that the question of the capacity of the plaintiff to acquire property of the state of Washington by eminent domain is within the jurisdiction of the court; and that the city of Tacoma has not been endowed with the statutory capacity to condemn state lands previously dedicated to a public use. Without this power, it cannot accomplish the plan set forth in the city ordinances before us; hence, for the reasons we have discussed herein, the judgment of the superior court is affirmed.

HILL, C. J., SCHWELLENBACH, ROSELLINI, and OTT, JJ., concur.

April 30, 1957. Petition for rehearing denied.

HILL, C. J. (concurring specially)—I have signed the majority opinion, but in fairness to all concerned it should be stated that this case had been assigned to one of the judges whose opinion did not prevail, and the case was not assigned to Judge Weaver for opinion until January 11, 1957.

DONWORTH, J. (dissenting)—I find myself in disagreement with the majority opinion for three reasons, which are stated below. Because of the importance of the constitutional question relating to the conflict between state and Federal powers, I deem it proper to state my views at some length.

My first two reasons, if valid, make it unnecessary to consider the third reason (the constitutional question). They are:

First, respondents (taxpayers of Tacoma) and cross-appellants (directors of fisheries and game, respectively) are precluded from raising the constitutional question because the law of the case was established on the first appeal (43 Wn. (2d) 468, 262 P. (2d) 214).

Second, the state is precluded from raising that question because it and cross-appellants are bound by the decision of the court of appeals for the ninth circuit in *State of Washington Department of Game* v. *Federal Power Comm.*, 207 F. (2d) 391, which is *res judicata* of this controversy.

The third reason is that, even assuming *arguendo* that the two doctrines of the law of the case and *res judicata* are not applicable, the majority opinion is in error in holding that appellant, under the facts shown in this record, has no power to condemn state-owned lands previously dedicated to public use when the legislature has not given it the power to so act.

In considering the first reason stated above, it is necessary to have in mind the issues which were raised or could

have been raised on the first appeal (43 Wn. (2d) 468). The demurrer to the complaint which was before this court on the first appeal admitted all facts well pleaded therein and reasonable inferences to be drawn therefrom. *Slater* v. *Bird*, 40 Wn. (2d) 848, 246 P. (2d) 460, and cases cited.

The demurrer admitted (among other things) that the Federal power commission, in its order of November 28, 1951, had made sixty-six findings of fact, including No. 53 and No. 59, reading as follows:

"The Applicant is a municipal corporation; it has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project; and it is a municipality within the meaning of Section 3(7) of the Act.

"Under present circumstances and conditions and upon the terms and conditions hereinafter included in the license, the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes."

Appellant alleged in its original complaint that ordinance No. 14386, in which it adopted the plan and system therein described and designated as the Cowlitz power development, provided for the acquisition of certain lands by purchase or condemnation. The lands which were to be affected by the project were described in the complaint as follows:

"Acquisition by purchase, condemnation, or otherwise of 16,000 acres of land, more or less, for dam sites, powerhouse sites, *reservoirs and storage basin sites*, operator's villages, tunnels, construction offices; fishways, fish hatcheries and other fish facilities, gravel pits, roads, bridges and necessary right of ways, said lands being located in

"Sections 1, 2, 3, 9, 10, 11, 16, 19, 20, 21, 27, 28, 29 and 30 of Township 12 North, Range 2 East of Willamette

Meridian; Sections 25, 26, 34 and 35 of Township 13 North, Range 2 East, W. M.; Sections 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 22, 23 and 24 of Township 12 North, Range 3 East, W. M.; Sections 7, 18, 19, 20, 27, 28, 29, 30, 32 33, 34, 35 and 36 of Township 12 North, Range 4 East, W. M.; Sections 1, 2, 3, 4, 11 and 12 of Township 11 North, Range 4 East, W. M.; Sections 28, 29, 30, 31, 32, 33 and 34 of Township 12 North, Range 5 East, W. M.; and Sections 2, 3, 4, 5 and 6 of Township 11 North, Range 5 East, W. M.; all of said lands being located in Lewis County of the State of Washington,

also acquisition of right of ways for relocation of those portions of state, county and private roads and *highways*, and telephone and power lines *inundated by storage water impounded behind said dams;* acquisition of right of ways for such spur railroad tracks or access roads as may be required to be extended from the closest feasible point on available railroads or public highways to a point at or near said dam sites; *acquisition of such fish hatchery sites and water rights as may be required by the Federal Power Commission; . . .*" (Italics mine.)

From this legal description (contained in the original complaint) of the lands to be taken, damaged, or inundated by the reservoirs and storage basin sites, which included state lands devoted to public uses, respondents were charged with notice of the nature and extent of appellant's proposed condemnation proceedings.

Respondents state in their brief that:

"... Also there is no reference in the remotest sense in the city's original complaint that any state land either previously dedicated to public use, or not, is to be taken..." I cannot agree with this statement. Under the allegations of the original complaint, respondents were as well able in 1952 to ascertain the nature and ownership of the land sought to be damaged or to be taken by appellant as they were in 1955, when they first asserted this contention in the instant case in their answer and affirmative defense.

Respondents could have and should have raised, by demurrer or otherwise, when this case was first instituted, the question as to the power of appellant to condemn state lands devoted to a public use. Not having dong so, respondents should be precluded from litigating that question in the present case. A pertinent application of the law of the case doctrine is found in the case of *Smith* v. *Seattle*, 20 Wash. 613, 56 Pac. 389, and the following portion of that decision is directly in point:

"Respondent urges as a preliminary consideration, that the complaint does not state a cause of action, but we think it cannot be permitted to urge the point. This cause was here on a former appeal by the plaintiff from an order of the lower court which sustained a general demurrer to the complaint. (See *Smith* v. *Seattle*, 18 Wash. 484, 51 Pac. 1057 63 Am. St. Rep. 910, for a full statement of the case.) That order was reversed, this court concluding that the complaint was sufficient. It is true that the ground upon which the respondent now seeks to attack the complaint was not presented on the former appeal, and, inasmuch as the point was not presented nor passed upon at that time, counsel for the city insist that they have a right to urge it now. While it is true that the point was not raised on the former appeal, it is patent that it might have been, and we think it would be a bad and unwarranted practice to permit the point to be urged now. In support of its general demurrrer, respondent was entitled to urge the insufficiency of the complaint from any standpoint, and must be held to have waived every point not presented at the former hearing. Any other practice would result in cases coming here piecemeal, delaying litigation, increasing the expense to parties litigant and burdening the court with unnecessary labor. It would be productive of much mischief and cannot be tolerated."

The rule is that questions which have been determined on a prior appeal, or which might have been determined had they been presented, will not be considered by the appellate court upon a second appeal of the same action. *Buob* v. *Feenaughty Machinery Co.*, 4 Wn. (2d) 276, 103

P. (2d) 325, and cases cited; *Gray* v. *Wikstrom Motors*, 18 Wn. (2d) 795, 140 P. (2d) 497.

It is also clear that the question of the plenary power of the legislature over municipal corporations was directly in issue in *Tacoma* v. *Taxpayers, supra*. Judge Hamley, in his dissenting opinion, made the same argument which the majority relies upon in the case at bar, as follows:

"The Federal government may not confer corporate powers upon local units of government, and the Federal power act does not purport to do so. The supersedure, if any, with respect to the exertion of police power, does not affect applicability of chapter 9 as an exercise of the other power named, for, in my view, the legislature would have intended the act to remain in force in the latter regard had the matter of supersedure been called to its attention.

"That the legislature may restrict the powers of municipalities, is beyond question. Cities are limited governmental arms of the state. *Russell* v. *Grandview*, 39 Wn. (2d) 551, 236 P. (2d) 1061. They may exercise only those powers which are granted to them in the state constitution or statutes. Except as limited by the constitution, legislative control over municipalities is therefore plenary. *State* v. *Aberdeen*, 34 Wash. 61, 74 Pac. 1022; *Wheeler School Dist.* v. *Hanlon*, 18 Wn. (2d) 37, 137 P. (2d) 1010. It follows that the legislature may enlarge or diminish powers already granted to such subordinate units of government. *State ex rel. Nat. Bank of Tacoma* v. *Tacoma*, 97 Wash. 190, 166 Pac. 66."

Cross-appellants and the state advance substantially the same arguments as respondents relative to the law of the case, and therefore, without further discussion of that point, it is my opinion that these parties are bound by that doctrine for the reasons above stated. The state's further contention that it was not then a party in *Tacoma* v. *Taxpayers, supra*, and therefore not bound by the law of the case, is untenable, for the reasons hereinafter stated on the question of *res judicata*.

Turning now to my second reason for dissenting, to wit, that cross-appellants and the state are bound by the doctrine of *res judicata*, I wish to refer to certain undisputed facts shown in the record.

Appellant pleaded in its reply that the decision of the court of appeals for the ninth circuit in *State of Washington Department of Game* v. *Federal Power Comm.*, *supra*, was a bar to the position now taken by cross-appellants and the state in this court.

In 1948, appellant filed its declaration of intention to construct the Cowlitz project and followed this with its application to the Federal Power Commission for a license under the Federal Power Act (16 U.S.C.A., §791 *et seq.*). As required by the act, notice was served upon the state, in response to which the attorney general filed a petition to intervene upon behalf of the departments of fish and game of the state of Washington. The petition alleged that the state of Washington was a sovereign state of the United States, and that the state of Washington department of game and state of Washington department of fisheries were each a department and subdivision thereof, charged with the duty of enforcing its laws, rules, and regulations relative to the conservation of food fish and game fish. The petition contained this allegation in paragraph nine:

"That the reservoirs which would be created by the proposed dams would inundate a valuable and irreplacable fish hatchery owned by the State of Washington, as well as much productive spawning areas."

In addition, there was a petition for intervention filed on behalf of Washington State Sportsmen's Council, Inc., a nonprofit corporation, in opposition to the granting of a license to appellant. This petition contained an allegation identical to that last above quoted. Appellant's answer to this petition admitted the allegation. Both petitions for intervention were allowed.

Upon the issues thus framed, hearings were thereafter held before a presiding examiner of the Federal power commission, which consumed twenty-four days. An assistant attorney general, designated by his superior for the purpose, participated in these hearings and vigorously opposed appellant's application for a license. The attorney for the Sportsmen's Council did likewise.

During the proceedings, the assistant attorney general called Robert Meigs, assistant chief of the fish management division for the Washington state department of game, to testify on behalf of interveners. His testimony was, in part, as follows:

"Q. Now, does the State of Washington Game Department have a hatchery on the Cowlitz watershed? A. Yes, we have what we refer to as the Mossyrock Hatchery, which is located a short distance from Mossyrock, Washington. [3348] Q. Is it within the area that would be inundated by these dams? A. According to information furnished us by Tacoma, the flood line from the Mayfield reservoir would extend some 400 feet past the hatchery and would flood it out. Mr. Mason: You mean 400 feet vertically or horizontally? The Witness: That I don't recall. I don't think vertically; horizontally."

Thus the proposed inundation of the Mossyrock hatchery, owned and operated by the state of Washington, was not only admitted in the pleadings but was proven by undisputed evidence. Furthermore, it is indisputable that the flooding of the state's hatchery was an obvious part of the comprehensive scheme of the development of the Cowlitz river, which appellant was asking the power commission to approve in granting the city the license for which it was applying.

At the conclusion of the hearings, the presiding examiner recommended against issuance of the license. Appellant filed exceptions, and the matter was argued orally by all parties before the commission.

Thereafter, the Federal power commission made findings of fact, rendered an opinion, and issued the license to appellant.

Interveners filed a petition for rehearing before the commission, which was denied January 24, 1952.

On March 12, 1952, the state departments of game and fisheries *et al.* filed, in the United States court of appeals for the ninth circuit, a petition for review of the orders of the Federal power commission. The printed record in that case comprises 4,392 pages. One of the principal points relied upon by petitioners for annulment of commission's order was stated in the petition for review, as follows:

"Finding No. 53 by the Commission is not supported by substantial evidence and is contrary to Section 9(b) and 27 of the Federal Power Act in that Applicant has not complied with the Water Code of the State of Washington as required by said sections."

After setting forth the pertinent findings of the commission, and following a discussion of *First Iowa Hydro-Electric Cooperative* v. *Federal Power Comm.*, 328 U. S. 152, 90 L. Ed. 1143, 66 S. Ct. 906, the court of appeals answered this contention as follows:

"The Commission in our case acted within the scope of its discretion in not requiring Tacoma to show compliance with the laws of the State of Washington regulating the construction of dams in Washington, because compliance with those laws would have prevented the development of the Cowlitz Project; and in the opinion of the Commission of the Cowlitz Project was 'best adapted to a comprehensive plan' for the development of a concededly navigable stream. The Federal Government's Constitutional authority to regulate commerce and navigation includes the 'power to control the erection of structures in navigable waters', *United States* v. *Appalachian Power Co.*, 1940, 311 U. S. 377, 405, 61 S. Ct. 291, 298, 85 L. Ed. 243. The Federal Government's power over navigable waters is superior to that of the state. *McCready* v. *Virginia*, 1876, 94 U. S. 391, 24 L. Ed. 248.

"The objectors further contend that Tacoma, as a creature of the State of Washington, cannot act in opposition to the policy of the State or in derogation of its laws.

"Again, we turn to the *First Iowa* case, *supra*. There, too, the applicant for a federal license was a creature of the state and the chief opposition came from the state itself. Yet, the Supreme Court permitted the applicant to act inconsistently with the declared policy of its creator and to prevail in obtaining a license.

"Consistent with the *First Iowa* case, *supra*, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream, since the stream is under the dominion of the United States. However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness, bonding privileges. Questions of this nature may be required by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them." *State of Washington Department of Game v. Federal Power Commission*, 207 F. (2d) 391.

In the last paragraph above quoted, the court of appeals clarified that there might be a question of municipal indebtedness limitation or some other related question involved, and cited the case of *Tacoma v. Taxpayers*, then pending in this court. (Not such question was raised at the first appeal or subsequently.)

The state laws which the court of appeals held were not bar to construction of the Cowlitz project were the same laws passed upon by this court in *Tacoma v. Taxpayers* [illegible], the Columbia river fish sanctuary act and the fisheries code.

The court of appeals declined to consider any of the findings of the commission which were attacked by the petitioners. The court found that those findings (including Nos. 53 and 59, quoted supra) were supported by substantial evidence

and declined to interfere with the commission's order granting the license to the city of Tacoma.

The petitioners' petition for certiorari to the United States supreme court was denied on April 5, 1954. *Washington Department of Game v. Federal Power Comm.*, 347 U. S. 936, 98 L. Ed. 1087, 74 S. Ct. 626.

Cross-appellants and the state now vigorously attempt to avoid the effect of the two prior appeals in this litigation. They state in their briefs:

". . . We will, however, limit our remarks to the state of the pleadings after August 8, 1950, since this was a date on which the court, in the proper exercise of its discretion, granted the City's request to file an amended complaint and also permitted the State of Washington to intervene *pro forma* to be added as a party defendant. At this point, with respect to the state of the pleadings, there was a fresh lawsuit, and we believe any discussion of prior pleadings would be immaterial. . . ." (Italics ours.)

The only purpose in filing appellant's amended complaint was to incorporate an allegation that appellant's case had been amended to grant appellant an extension of time within which to commence construction of the Cowlitz project, and to incorporate Ordinance No. 1438 and amendments of Ordinance No. 1438. There was no material change in the pleadings.

The real crux of the argument advanced seems to be that, by adding the "Secretary, State of Washington" as a party in the present case, it became a new and independent cause. This position cannot be sustained.

In *State v. Pacific Tel. & Tel. Co.*, 9 Wn. (2d) 11, 113 P. (2d) 542, the state of Washington attempted by original action to recover the statutory sales and use tax on goods purchased outside this state by defendant. In a previous case defendant had obtained a judgment permanently enjoining collection of such tax by the tax commissioner of the state of Wash-

ington. *(Pacific Tel. & Tel. Co. v. Hemingford*, 195 Wash. 53[illegible] S.Ct. (2d) 786.) On appeal, this court held that the tax was an unlawful burden on interstate commerce. The question presented in the second case was whether the first suit was *res judicata*, and this question depended upon whether or not the state of Washington was actually a party in the first suit, even though that suit had been maintained against the tax commissioners. The court stated:

"The general rule is that a judgment for or against the state or an officer or agency thereof in matters as to which such officer or agency is entitled to represent the state is litigation conclusive for or against the state."

After discussing the pertinent statutes, the court concluded that the tax commissioners were authorized to represent the state in collection of the use tax, and that the judgment in the prior action was *res judicata* as against the state in the second action.

In the case at bar, the director of fisheries and the director of game are charged with the duty of enforcing the rules and regulations of their respective departments relative to the conservation and preservation of food fish and of game fish. See RCW 75.08.080 and RCW 77.04.080.

Further powers and duties of the director of fisheries are as follows: He has authority to enter into agreements with the department of defense relative to coordinating and regulating the control of fishing in the waters of the state over which the department of defense has assumed control (RCW 75.08.025); the power to establish and maintain state fish hatcheries, rearing stations, eyeing stations, brood ponds, and other facilities as in his judgment may be necessary for the exercise of his powers (RCW 75.08.060); the authority to accept money from municipalities, or other governmental units, in settlement of any claim for damages to food fish resources, and he is by statute designated the agent of the state to accept and receive all such funds and deposit them with the state's treasurer (RCW 75.16.050).

The director of game has similar powers conferred upon him by statute (RCW 77.12.200, 77.12.210, 77.12.220).

Under authority of these statutes, I am of the opinion that the directors of fisheries and of game, as agents of the state, are vitally interested in the continued existence of the Mossyrock hatchery. Their interest therein is not personal, nor is it an interest different from that of the sovereign state. The departments of fisheries and of game are but limited subdivisions of the state itself. They do not exist as entities *sui juris*, as does, for example, the state power commission. Therefore, the Mossyrock hatchery, which is concededly owned by the state, is under the jurisdiction of the departments of fisheries and of game, but they exercise control over it merely as agents of the state.

The directors of fisheries and of game were, therefore, properly joined as parties to the proceedings herein, and, under the rule announced in *State v. Pacific Tel. & Tel. Co.*, supra, it was their duty to represent the state. I conclude that the litigation in this court, as well as in *State of Washington Department of Game v. Federal Power Comm.*, supra, has at all times been an action against the state.

There is another basis for my conclusion that the state has been represented at all times in this action. The attorney general designated certain of his assistants to represent the departments of fisheries and of game in this litigation, in accordance with the following pertinent statutes.

RCW 43.10.030, defining the powers and duties of the attorney general, provides that he shall:

"(1) Appear for and represent the state before the courts in all cases in which the state is interested;

"(2) Institute and prosecute all actions and proceedings in behalf of, or for the use of the state, which may be necessary in the execution of the duties of any state officer;

"(3) Defend all actions and proceedings against any state officer in his official capacity, in any of the courts of this state or the United States;

"(5) Consult with and advise the governor, members of the legislature and other state officers, and when requested, give written opinions upon all constitutional or legal questions relating to the duties of such officers; . . ."

Under RCW 43.10.040, it is further provided that:

"The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi-legal matters, hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi-legal questions, except those declared by law to be the duty of the prosecuting attorney of any county."

Under the authority of these statutes, the state of Washington was represented by its attorney general, both before the commission and the court of appeals.

"The Attorney General for the State appointed a special assistant attorney general to represent all persons not otherwise represented whose views were in conflict with the State Departments of Game and Fisheries. Thus, the State of Washington by its Attorney General, and the people of Washington holding views not in harmony with the State's official position, and the applicant City of Tacoma were represented at the hearing which was had before an Examiner." *State of Washington Department of Game* v. *Federal Power Comm.*, 207 F. (2d) 391, 393.

He could and should have raised, before the Federal power commission and the court of appeals, the objection that appellant did not have statutory authority to condemn state lands devoted to public uses.

It is the purpose of the law that where issues have once been litigated and decided, the litigation shall then be at an end.

Where a party has had a full opportunity to present all the defenses at his command, and fails to do so, the doctrine of *res judicata* applies. *Symington* v. *Hudson*, 10 Wn. (2d) 331, 243 P. (2d) 484.

This doctrine was applied by the supreme court of the United States in *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591, 92 L. Ed. 898, 68 S. Ct. 715, where it was said:

"It is first necessary to understand something of the recognized meaning and scope of *res judicata*, a doctrine judicial in origin. The general rule of *res judicata* applies to repetitions suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell* v. *County of Sac*, 94 U. S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, 'Res Judicata,' 38 Yale L. J. 299; Restatement of the Law of Judgments, §§ 47, 48."

The rule above stated is directly applicable in this case. In *State of Washington Department of Game* v. *Federal Power Comm.*, *supra*, the pleadings admitted, and the proof established, that the Mossyrock hatchery would be isolated and, of necessity, taken by second or other proceedings. The final judgment entered in that case is, therefore, binding upon cross appellants and the state as to the issue of condemnation, which they now contend is before this court for the first time.

Neither the entry of new counsel into the case [illegible] addition of a sovereign state as a party defendant after its

duly appointed representatives had lost the case, changes the character of the lawsuit. I am of the opinion that the decision of the court of appeals for the ninth circuit, in the case of *State of Washington Department of Game* v. *Federal Power Comm.*, *supra*, is *res judicata* as against both cross-appellants and the state.

Assuming *arguendo* that neither the doctrine of the law of the case nor the doctrine of *res judicata* applies to the facts before us, then my third reason for dissenting is that the majority has misconstrued the Federal power act and has failed to give it the supremacy over state laws which should be accorded it under the commerce clause of the United States constitution.

I am entirely in agreement with the majority in its statement of the general rule that a municipality is a creature of the legislature, and that its powers (including that of eminent domain) are derived from the legislature or the constitution. It has no power of eminent domain except as granted by the legislature. But, in this case (as stated on the first appeal), the power of Congress, under the commerce clause, is superior to that of the state when Congress exercises its power as it did in enacting the Federal power act.

The two principal decisions of the United States supreme court construing the power act and its supremacy under the commerce clause were discussed in this court's opinion on the first appeal. They are *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. Ed. 243, 61 S. Ct. 291, and *First Iowa Hydro-Electric Cooperative* v. *Federal Power Comm.*, 328 U. S. 152, 90 L. Ed. 1143, 66 S. Ct. 906. These two decisions will herein be referred to as the *Appalachian* case and the *First Iowa* case, respectively.

Bearing in mind the holding in these two cases that Congress has plenary power over navigable waters, and

that it may deny, or grant, on such terms as it sees fit, the privilege of constructing dams therein, I wish to invite attention to certain provisions of the Federal power act (41 Stat. 1063).

In § 4(e) (16 U.S.C.A. § 797), the Federal power commission (herein referred to as the commission) was authorized to issue licenses for the construction of dams and appurtenances to certain entities, including "any state or municipality." In the preceding § 3, Congress defined the term "municipality" as follows:

" 'municipality' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power; . . ."

Under § 6 (16 U.S.C.A. § 799), the commission may issue such licenses for a period not exceeding fifty years which may be conditioned upon the acceptance by the licensee of certain terms and conditions stated in the act and of any others that may be prescribed by the commission pursuant thereto.

Section 9 (16 U.S.C.A. § 802) provides:

"Each applicant for a license under this chapter shall submit to the commission—

"(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation,

diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

"(c) Such additional information as the commission may require."

Section 10 (16 U.S.C.A. § 803) prescribes certain conditions on which all licenses shall be issued. Subdivision (a) thereof reads as follows:

"That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

By § 14 (16 U.S.C.A. § 807), the United States is granted an option to purchase any project upon or after the expiration of the license upon payment of the net investment of the licensee if the purchase price be not mutually agreed upon by the parties. The term "net investment" is defined in § 3 of the act (16 U.S.C.A. § 796).

Licensees are granted the power of eminent domain in § 21 (16 U.S.C.A. § 814) in the following language:

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use

or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000."

Without further reviewing the provisions of the Federal power act, it is apparent that Congress intended to and did exercise its full power under the commerce clause in providing for the licensing of the projects described therein. When the power commission has made a finding as required by § 9(b) that the licensee has complied with state laws with respect to the right to engage in the business of developing, transmitting, and distributing electric power and any other business necessary to effect the purposes of the licensee under the act, then the licensee becomes the agent of the Federal government in regard to the project. Upon the issuance of the license, all rights and obligations of the licensee are derived from congressional, constitutional powers, and not those of the state where the project is located. See *First Iowa* case.

The project for which the license is issued is a Federal project and is to be considered as if it were to be constructed and operated by the government itself. The government has an option to buy the project works at the end of the license period, as provided in § 14 of the act. Every detail of the project must be carried out by the licensee in strict accordance with the terms of the license and the maps and drawings identified therein. The comprehensive plan adopted by the power commission for the

development of the waterway may not be deviated from by a licensee without permission of the commission.

The licensee derives the power of eminent domain from § 21 of the act (quoted above). Long before the passage of the act, Congress, in 1906 (34 Stat. 462), enacted a special act authorizing the city of St. Louis to construct a bridge across the Mississippi river in accordance with the general bridge act. With respect to the exercise of the power of eminent domain, § 2 of the special act provided:

"That for the purpose of carrying into effect the objects of this Act, the city of Saint Louis may receive, purchase, and also acquire by lawful appropriation and condemnation in the States of Illinois and Missouri, upon making proper compensation, to be ascertained according to the laws of the State within which the same is located, real and personal property and rights of property, and may make any and every use of the same necessary and proper for the construction, maintenance, and operation of said bridge and approaches consistent with the laws of the United States and of the said States respectively."

The authority of St. Louis to condemn lands for bridge approaches in Illinois was challenged. In *Latinette* v. *St. Louis*, 201 Fed. 676, the circuit court of appeals (7th cir.) disposed of this challenge by saying:

"Only consent was given by section 1 of this latter act to build the bridge in the manner and on the conditions expressed in the general bridge statute. Authority to exercise the sovereign power of appropriation, if given at all, was conferred in section 2. Appellant's contention is that the words 'according to the laws of the state' show that Congress meant that St. Louis should not have power to condemn except by virtue of state law, and that, inasmuch as Illinois refuses to give St. Louis the power, the judgment must be reversed. But, looking to the construction of the sentence, it seems clear to us that only the 'compensation' is 'to be ascertained according to the laws of the state.' Furthermore, while Congress might tell its agent to go to the state law for the rules of practice,

it could not constitutionally effect anything by telling its agent to go to the state law for power to condemn land for a national purpose. Condemnation is an attribute of sovereignty. It must be exercised directly by the sovereign or through an agency appointed by the sovereign. Neither the power nor the selection of agents can be transferred to another. States have the power only for state purposes; the nation, only for national purposes. *So, the power to condemn mentioned in section 2 must be referred to the national power.* And finally, Congress in framing section 2 used a formula of expression which had already been judicially construed. In *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808, the act provided that the bridge company might 'acquire by lawful appropriation and condemnation, upon making proper compensation therefor, to be ascertained according to the laws of the state within which the same is located, real and personal property and rights of property'; and these words, the same as in the case at bar, were held to relate to the national power.

"Contention is therefore narrowed to this: That Congress could not constitutionally select appellee as the agency through which a national power should be exercised. Nothing in the Constitution forbids the selection of a state corporation as a national agent. In reason the material thing is the principal's authority, not the parentage or birthplace of the agent. And the decisions of Mr. Justice Bradley at circuit in *Stockton* v. *B. & N. Rld. Co.*, (C. C.) 32 Fed. 9, and of the Supreme Court in *Cherokee Nation* v. *Kansas Ry. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295, explicitly cover the point." (Italics mine.)

Another case which does involve the right of a licensee under the act to exercise the power of eminent domain is *State of Missouri ex rel. Camden County* v. *Union Electric Light & Power Co.*, 42 F. (2d) 692. There, a private utility corporation had received a license from the power commission to build a dam for the purpose of producing hydro-electric power. The plan contemplated a dam which

". . . would inevitably create an immense reservoir and cause the inundation of vast tracts and bodies of land, the submergence of many public highways and school districts, and the permanent overflow of the village of Linn Creek in Camden county, which is now the county seat of said county; and that the courthouse and other public property situated in said Linn Creek would be flooded and rendered useless."

The state of Missouri and Camden county brought an action in the United States district court to enjoin the construction of the proposed dam. After discussing the power of Congress under the commerce clause and the effect of the Federal water power act of 1920 (prior to the 1935 amendment), the court considered § 21, relating to the power of eminent domain as it related to property already devoted to a public use. After quoting § 21, the court said:

"The licensee has been granted the power to acquire property by the exercise of eminent domain in express terms. Concededly this right may be exercised as against private property.

" 'Public lands,' as used in the act, refers only to lands owned by the United States. The only question, therefore, that is here presented is whether the right of eminent domain may be exercised against property already dedicated to a public use when situated within the proposed reservoir and to be affected by the improvement.

"While it is well settled that the Legislature may authorize the taking of property already devoted to a public use, it is equally well established that a general delegation of the power of eminent domain does not authorize the taking of property already devoted to a public use, '*unless it can clearly be inferred from the nature of the improvements authorized or from the impracticability of constructing them without encroaching upon such property that the legislature intended to authorize such a taking.*' 10 R. C. L. § 169; Western Union Telegraph Co. v. Pennsylvania R. R. Co. *et al.*, 195 U. S. 540, 25 S. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517. In this

connection it cannot be questioned but that the Congress had the power to confer the right of eminent domain upon the defendant Union Electric Light & Power Company, 10 R. C. L. § 167.

"In the instant case the Congress must have contemplated this identical situation; hence the requirement of notice. Moreover, the proposed improvements could not be accomplished, except through the exercise, if necessary, of eminent domain against property already dedicated to public use. *To deny the right of eminent domain as against this public property would not only defeat the functions of the national government, but would run contrary to the obvious intent of the Congress as expressed in the Water Power Act.* Stockton, Attorney General, v. Baltimore & New York R. R. Co., (C. C.) 32 F. 9; 20 C. J. § 90, P. 602; Vermont. Hydro-Electric Corporation v. Dunn et al., 95 Vt. 144, 112 A. 223, 12 A. L. R. 1495; Imperial Irrigation Co. v. Jayne, 104 Tex. 395, 138 S. W. 575, Ann. Cas. 1914B, 322.

"It is not within the judicial power to question the purpose for which property is to be taken under the power of eminent domain. The necessity for the taking is not a judicial question, but is exclusively within the power of Congress and one which it may determine by direct enactment or by delegating the power to some officer or board. Kaw Valley Drainage District of Wyandotte County, Kansas, et al. v. Metropolitan Water Co., (C. C. A.) 186 F. 315." (Last italics mine.)

The state's prayer for an injunction to prevent the flooding of the public property within the proposed reservoir was denied.

The majority opinion holds that the state of Washington may now, at this late date, appear in this declaratory judgment action and obtain a declaration that appellant may not condemn the right to flood the Mossyrock hatchery because the legislature has not authorized such a proceeding.

In my opinion, the assertion comes too late, because the power commission, in a proceeding before it (to which the

state was a party), found (finding No. 53) that appellant had authority under state law to do everything necessary to carry out the provisions of the license granted it. The record showed that the acquisition of the right to flood this state-owned hatchery was an essential part of the comprehensive plan for the development of the Cowlitz river, which the power commission had approved and for which the license was issued to appellant. As previously stated, the state's challenge of this finding was overruled by the court of appeals for the ninth circuit (207 F. (2d) 391). To uphold the state's contention in the present case, is to overrule the decision of a Federal court in a matter over which it had jurisdiction. It seems to me that considerations of comity forbid our doing so.

But the most serious error in the majority opinion (as I see it) is the disregard of the constitutional separation of state and Federal powers as recognized by the supreme court's decisions in the *Appalachian* and *First Iowa* cases. It would extend this opinion beyond all permissible limits to review those decisions in detail. The supreme court plainly held that the power commission had sole jurisdiction to determine whether a licensee had authority under state laws to carry out the terms of its license.

This holding is emphasized by the dissenting opinion of Justice Frankfurter, who did not disagree with the court's interpretation of the Federal power act nor the constitutional power of Congress to enact it. He felt that under § 9(b) the power commission should not make a finding regarding state laws until the state courts had interpreted them. This is clear from the following portion of his dissenting opinion:

"By § 9(b) of the Act, 41 Stat. 1063, 1068; 16 U. S. C. § 802(b), Congress explicitly required that before the Commission can issue a license for the construction of a hydroelectric development, such as the proposed project of the petitioner, the Commission must have 'satisfactory

evidence that the applicant has complied with the requirements of the laws of the State' in reference to the matters enumerated.

"Whether the Commission has such 'satisfactory evidence' necessarily depends upon what the requirements of State law are. In turn, what the requirements of State law are often depends upon the appropriate but unsettled construction of State law. And so, the Commission may well be confronted, as it was in this case, with the necessity of determining what the State law requires before it can determine whether the applicant has satisfied it, and therefore, whether the condition for exercising the Commission's power has been fulfilled.

"To safeguard the interests of the States thus protected by § 9(b), Congress has directed that notice be given to the State when an application has been filed for a license, the granting of which may especially affect a State. Section 4(f), 49 Stat. 838, 841; 16 U.S.C. § 797(f). *If a State does not challenge the claim of an applicant, the evidence submitted by the applicant, if found to be satisfactory by the Commission, has met the demands of § 9(b), and a State cannot thereafter challenge the Commission's determination.*" (Italics mine.)

The majority of that court in the *First Iowa* case did not indicate any disagreement with the italicized portion of the dissent quoted. The majority were of the view that the commission could make findings under § 9(b) in the absence of state court decisions interpreting state statutes. We are, of course, bound by the majority decision.

To hold otherwise is to permit the state of Washington to exercise a veto as to the project involved in the case before us by saying that the power commission was wrong in finding that the city of Tacoma had authority under state law to construct these dams, because the city has no authority to condemn the right to flood the state's fish hatchery. Under the decision in the *First Iowa* case, the power commission has exclusive jurisdiction to make a finding whether a licensee has authority under state law

to engage in the power business. (§ 9(b)). The power commission has made that finding (the circuit court refused to set aside the finding), so that factual issue was permanently and effectively settled.

The Federal power act in § 21 affords a licensee ample authority as an agent of the Federal government to exercise the power of eminent domain without state authority. A state may not deny or impair this authority once a license has been issued.

The majority opinion concludes with the following statement of its decision on the constitutional question presented:

"In the instant case, the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition;* it presents a question of *lack of state statutory power* in the city. It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the state of Washington.

"The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal power act, as we read it, does not purport to do so.

"If it be held that the Federal government may endow a state-created municipality with powers greater than those given it by its creator, the state legislature, a momentous and novel theory of constitutional government has been evolved that will eventually relegate a sovereign state to a position of impotence never contemplated by the framers of our constitutions, state and Federal."

However much I might agree with the majority's statement in the last paragraph above quoted as to the effect of such a holding on the powers of a sovereign state, several decisions of the United States supreme court rendered in the past twenty-five years construing the commerce clause (in addition to the *Appalachian* and *First Iowa* cases) compel my dissent from the majority holding as stated in the first two paragraphs of the quotation.

An excellent discussion of these decisions is found in the January, 1957, issue of the American Bar Association Journal (Vol. 43, p. 55) under the subheading "The Commerce Clause—Then and Now." Among the decisions cited therein are: *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352 (upholding the validity of the Wagner Act under the commerce clause); *United States* v. *Darby*, 312 U. S. 100, 85 L. Ed. 609, 61 S. Ct. 451, 132 A. L. R. 1430 (upholding the validity of the fair labor standards act under the commerce clause); *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162 (holding that the insurance business may be regulated by Congress under the commerce clause).

Other examples of acts of Congress, based upon the commerce clause and having a similar effect upon the powers of the states, which have been held valid by the Federal courts are: Securities act of 1933, declared constitutional in *Jones* v. *Securities & Exchange Comm.*, 298 U. S. 1, 80 L. Ed. 1015, 56 S. Ct. 654; Securities exchange act of 1934, declared constitutional in *Wright* v. *Securities & Exchange Comm.*, 112 F. (2d) 89 (C.C.A. 1940).

Whatever views one may entertain regarding the effect of these decisions upon powers of the sovereign states, the supreme court remains the final authority on the constitutionality and interpretation of these acts of Congress as well as of the Federal power act. Under Art. VI of the United States constitution, the laws of the United States made in pursuance thereof are declared to be the supreme law of the land, binding on state judges regardless of any state laws or constitutional provisions to the contrary.

Therefore, deeming myself bound by the decisions of the supreme court in the *Appalachian* and *First Iowa* cases, interpreting the Federal power act, I am impelled to dissent from the opinion of the majority in this case.

Without further extending my views, I deem it sufficient to state that, in my opinion, appellant's amended complaint states a cause of action, and that the several answers and cross-complaints herein have not raised a valid defense, for the reasons heretofore given.

My conclusion is that appellant has a valid license issued by the Federal power commission for construction of the Cowlitz project, and that the utility bonds authorized by ordinance No. 14386, as amended, have not been shown to be invalid in any respect.

I would dispose of this case as follows:

The portion of the judgment from which the cross-appeal is taken should be affirmed. On appellant's appeal, the judgment of the trial court should be set aside, and the cause remanded to the superior court with directions to enter a declaratory judgment for appellant in conformity with the views expressed herein. The injunction *pendente lite*, heretofore continued in effect by order of this court, should be dissolved.

MALLERY and FINLEY, JJ., concur with DONWORTH, J.

APPENDIX B

(No. 32411. *En Banc.* October 14, 1953.)

THE CITY OF TACOMA, *Appellant*, v. THE TAXPAYERS OF TACOMA, *Respondents*, ROBERT SCHOETTLER, *as State Director of Fisheries, et al., Respondents and Cross-appellants.*[1]

Cross-appeals from a judgment of the superior court for Thurston county, No. 26572, Wright, J., entered December 15, 1952, sustaining a demurrer to the complaint, dismissing an action to determine a city's right to issue and sell certain utility bonds. Reversed on plaintiff's appeal; cross-appeal dismissed.

Clarence M. Boyle, J. D. Barline, and *E. K. Murray*, for appellant.

Copeland & Tollefson, for respondents.

The Attorney General and *Lee Olwell, Harold A. Pebbles*, and *William E. Hicks, Special Assistants, for* respondents and cross-appellants.

DONWORTH, J.—This action was instituted by the city of Tacoma against the taxpayers of Tacoma and the directors of game and fisheries of the state of Washington, under the provisions of RCW 7.24.010 *et seq.* [*cf.* Rem. Rev. Stat. (Sup.), § 784-1, *et seq.*], relating to declaratory judgments, and RCW 7.24.150 *et seq.* [*cf.* Rem. Rev. Stat. (Sup.), § 5616-11 *et seq.*] providing for testing and determining the validity of a proposed bond issue.

The purpose of the suit was to determine plaintiff's right to issue and sell certain utility bonds to finance the construction of two power dams on the Cowlitz river in Lewis county, Washington, as provided by its ordinance No. 14386, and particularly to determine whether chapter 9, Laws of 1949, p. 38 [*cf.* RCW 75.20.010 *et seq.*], or §§ 46 and 49, pp. 272, 274, chapter 112, Laws of 1949 [*cf.* RCW 75.20.050 and 75.20.100], or any other law of the state of Washington is

[1] Reported in 262 P. (2d) 214.

a bar to such construction and to the issuance and sale of the bonds.

Pursuant to the provisions of RCW 7.24.150, the superior court for Pierce county appointed certain citizens and taxpayers to represent all taxpayers of the city of Tacoma as defendants in the suit. The defendant taxpayers demurred to the complaint. The directors of game and fisheries filed an amended answer and cross-complaint, denying the material allegations of the complaint, and by way of affirmative defense and cross-complaint alleged that the contemplated dam construction was illegal under state law. The directors prayed that ordinance No. 14386 of the city of Tacoma be adjudged unlawful and that plaintiff be perpetually enjoined from constructing the dams. Plaintiff demurred to the amended answer and cross-complaint.

By stipulation of the parties and order of the superior court for Pierce county, the venue of the case was transferred to the superior court of Thurston county. That court heard arguments and sustained the taxpayers' demurrer to the complaint on the ground that it failed to state a cause of action and stated in its order of dismissal that this ruling substantially disposed of the entire matter and made it unnecessary to consider plaintiff's demurrer to the cross-complaint. Upon plaintiff's election to stand on its complaint, the court dismissed the action with prejudice.

Plaintiff has appealed from the judgment of dismissal. Defendant directors have cross-appealed from the court's refusal to enter an order overruling plaintiff's demurrer to their amended cross-complaint and its refusal to enter findings of fact, conclusions of law, and judgment against plaintiff.

For purposes of this appeal, the city of Tacoma will be referred to as appellant, the taxpayers of Tacoma will be referred to as respondents, and the directors of game and fisheries as cross-appellants.

The facts alleged in appellant's complaint which are necessary to an understanding of this controversy are these:

On August 6, 1948, appellant filed with the Federal power commission its declaration of intention to construct two power dams on the Cowlitz river in the state of Washington, pursuant to § 23 (b) of the Federal power act (16 U. S. C. A. § 817).

Thereafter, on December 28, 1948, it filed with the power commission an application for a Federal license to construct these dams (project No. 2016). The smaller dam, as proposed, is to be located at mile 52 on the Cowlitz river, about a mile southeast of the town of Mayfield. It is to be approximately 185 feet in height above tailwater, have a storage capacity of approximately 127,000 acre feet, and have a powerhouse with an installed capacity of 120,000 kilowatts in three units.

The larger dam, as proposed, is to be constructed at mile 65 on the same river, approximately two and one-half miles east of the town of Mossyrock. This dam is to be approximately 325 feet above tailwater, have a storage reservoir with a capacity of approximately 1,375,000 acre feet and a powerhouse with an installed capacity of 225,000 kilowatts in three units. Provisions were made for expansion of the kilowatt output on each plant if necessary.

On March 8, 1949, the power commission made the following preliminary findings:

"(1) Construction and operation of the project proposed by the declarant would affect public lands or reservations of the United States.

"(2) Boats have navigated the Cowlitz River to Toledo and during high water stages boats have navigated the river for some distance above Toledo.

"(3) The United States has improved the Cowlitz River by snagging, dredging and regulating works from its mouth to Toledo to obtain a minimum navigable depth of 2½ feet.

"(4) The Cowlitz River from its point of junction with the Columbia River to at least Toledo is a navigable water of the United States and may be a navigable water of the United States for some distance upstream from Toledo.

"(5) Either or both of the proposed reservoirs would have sufficient usable storage capacity to enable either or both of them to be operated in such a manner as to materially affect the water stage in the Cowlitz River at Toledo or below, which section of the river we have found to be a navigable water of the United States, and thus the construction of either or both of the proposed reservoirs would materially affect the navigable capacity of the Cowlitz River.

"(6) The interests of interstate or foreign commerce would be affected by the construction and operation of either or both of the reservoirs proposed by the declarant."

These findings were followed by an order requiring appellant to secure a license under the provisions of the Federal power act before commencing construction of either of the proposed dams.

The power commission thereafter conducted extended hearings on appellant's application for a Federal license, at which hearings the departments of fisheries and of game of the state of Washington participated as interveners, along with other interested groups.

Under date of November 28, 1951, the power commission issued its opinion (No. 221) and order issuing the license to appellant. The order recited sixty-six findings of fact and then stated:

"The Commission orders:

"(A) This license is issued to the City of Tacoma, Washington, under Section 4 (e) of the Act for a period of 50 years, effective as of the first day of the month in which the accepted license is filed with the Commission by the Licensee, for the construction, operation and maintenance of Project No. 2016 upon the Cowlitz River, a stream over which Congress has jurisdiction, and upon lands of the

United States, subject to the terms and conditions of the Act which is incorporated by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

"(B) This license is also subject to the terms and conditions set forth in Form L-6 entitled 'Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States,' which terms and conditions are attached hereto and made a part hereof; and subject to the following special conditions set forth herein as additional articles:

[Here follow Articles 28 to 35, inclusive.]

"(C) The exhibits specified in paragraph (63) above are approved as part of this license.

"(D) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed within the 30-day period provided by Section 313 (a) of the Act.

"(E) This license shall be accepted and returned to the Commission within 60 days from date of issuance of this order."

Appellant by authority of its city council formally accepted all the provisions, terms, and conditions of this license on December 28, 1951.

On December 26, 1951, the departments of fisheries and of game and the Washington State Sportsmen's Council, Inc., filed an application for rehearing. This application was denied by the power commission on January 22, 1952, in an order stating in part:

"The Interveners appear to be under the impression that the Commission failed to consider the proposed Cowlitz Project in relation to the Columbia Basin as a whole. As shown by the numerous specific findings in the opinion and order issued November 28, 1951, the Commission considered and analyzed the evidence as related specifically to the Cowlitz Project alone and as related to the comprehensive

development of the entire Columbia River Basin. It was only after the Commission had examined all the plans in evidence relating to the comprehensive development of the Pacific Northwest Region that it reached the conclusion that the Cowlitz Project was best adapted to a comprehensive plan for developing the Columbia River watershed for the use and benefit of interstate commerce and the other beneficial public uses."

On January 9, 1952, appellant's city council duly enacted ordinance No. 14386 (which became effective January 20, 1952), in which it adopted the plan and system therein described and designated as the Cowlitz power development as an addition to, and an extension of, its existing facilities for the generation and distribution of electric energy. This ordinance authorized the construction of the Mossyrock and Mayfield dams and, to provide the necessary additional funds, authorized the issuance and sale of utility revenue bonds, from time to time, not exceeding the total principal amount of $146,000,000. There was included in the ordinance the following:

"The construction of this project has been licensed by the Federal Power Commission under Project No. 2016, and the construction herein authorized shall conform with the requirements of such license.

"Section 3. That the entire improvement consisting of the additions and betterments to and extensions of the said existing electric generating plant and system shall be known and designated as Cowlitz Power Development. That the total estimated cost of said Development declared as near as may be is the sum of $146,000,000.00."

Appellant's complaint, containing the allegations which we have summarized above, was verified February 6, 1952.

The cross-appellants state in their brief that a petition for review of the orders of the power commission involved in this case has been filed by them in the circuit court of appeals for the ninth circuit (being cause No. 13289), and that the matter is now pending in that court. Consequently, the license issued to appellant is still in litigation and has

not become effective. Nevertheless, the present case has been submitted by the parties to this court and we deem it proper to decide it on the record presented to us.

[Subsequent to the preparation of this opinion, the circuit court of appeals on October 5, 1953, rendered its decision declining to interfere with the power commission's order. See *Washington Department of Game* v. *Federal Power Comm.*, 207 F. (2d) 391.]

The first question to be considered is whether appellant's complaint states a cause of action. On this appeal, the demurrer admits all facts well pleaded and reasonable inferences to be drawn therefrom. *Slater* v. *Bird*, 40 Wn. (2d) 848, 246 P. (2d) 460, and cases cited.

Thus it is admitted that the power commission found that appellant's proposed project will affect the navigability of at least part of the Cowlitz river, which it has determined to be a navigable water of the United States; that it will affect the interests of interstate commerce; that it will affect public lands or reservations of the United States, and that, therefore, the project is thus within the jurisdiction of the Federal power commission under the Federal power act. It is further admitted that the power commission has rendered its opinion No. 221 and has issued its license in the form attached to the complaint as exhibit "D".

The question presented is whether appellant, having complied with all applicable Federal laws and possessing a license issued by the Federal power commission, is barred from constructing the project because of certain laws of the state of Washington relating to the protection of fish.

The two acts principally relied upon by respondents and cross-appellants as barring appellant's construction of this project were enacted in 1949. They are:

(1) The Columbia river fish sanctuary act (Chapter 9, Laws of 1949).

This act is entitled:

"AN ACT relating to the protection of anadromous fish life in the rivers and streams tributary to the lower Columbia River and declaring an emergency."

Section 1 of the act [*cf.* RCW 75.20.010] reads:

"All streams and rivers tributary to the Columbia River downstream from McNary Dam are hereby reserved as an anadromous fish sanctuary against undue industrial encroachment for the preservation and development of the food and game fish resources of said river system and to that end there shall not be constructed thereon any dam of a height greater than twenty-five (25) feet that may be located within the migration range of any anadromous fish as jointly determined by the Director of Fisheries and the Director of Game, nor shall waters of the Cowlitz River or its tributaries or of the other streams within the sanctuary area be diverted for any purpose other than fisheries in such quantities that will reduce the respective stream flows below the annual average low flow, as delineated in existing or future United States Geological Survey reports: *Provided*, That when the flow of any of the streams referred to in this section is below the annual average, as delineated in existing or future United States Geological Survey reports, water may be diverted for use, subject to legal appropriation, upon the concurrent order of the Director of Fisheries and Director of Game."

Section 2 requires cross-appellants to acquire and abate any dam on any stream which may be in conflict with § 1. Section 3 exempts dams on two named rivers, and § 4 declares an emergency.

(2) Chapter 112, Laws of 1949, known as the Fisheries code of the state of Washington.

Section 46 thereof [*cf.* RCW 75.20.050] provides:

"It is hereby declared to be the policy of this state that a flow of water sufficient to support game fish and food fish

populations be maintained at all times in the streams of this state.

"The Supervisor of Hydraulics shall give the Director of Fisheries and the Director of Game notice of each application for a permit to divert water, or other hydraulic permit of any nature, and the Director of Fisheries and Director of Game shall have thirty (30) days after receiving said notice in which to state their objections to the application, and the permit shall not be issued until the thirty (30) days period provided for herein has elapsed.

"The Supervisor of Hydraulics may refuse to issue any permit to divert water, or any hydraulic permit of any nature, if, in the opinion of the Director of Fisheries or Director of Game, such a permit might result in lowering the flow of water in any stream below the flow necessary to adequately support food fish and game fish populations in the stream.

"The provisions of this section shall in no way affect existing water rights."

Section 49 thereof [*cf.* RCW 75.20.100] provides:

"In the event that any person or government agency desires to construct any form of hydraulic project or other project that will use, divert, obstruct or change the natural flow or bed of any river or stream or that will utilize any of the waters of the state or materials from the stream beds, such person or government agency shall submit to the Department of Fisheries and the Department of Game full plans and specifications of the proposed construction or work complete plans and specifications for the proper protection of fish life in connection therewith, the approximate date when such construction or work is to commence and shall secure the written approval of the Director of Fisheries and the Director of Game as to the adequacy of the means outlined for the protection of fishlife in connection therewith and as to the propriety of the proposed construction or work and time thereof in relation to fish life, before commencing construction or work thereon. If any person or government agency shall commence construction on any such works or projects without first providing plans and specifications subject to the approval of the Director of Fisheries and the Director of Game for the proper pro-

tection of fish life in connection therewith and without first having obtained written approval of the Director of Fisheries and the Director of Game as to the adequacy of such plans and specifications submitted for the protection of fish life, he shall be guilty of a gross misdemeanor. If any such person or government agency be convicted of violating any of the provisions of this act and continues construction on any such works or projects without fully complying with the provisions of this act, such works or projects are hereby declared a public nuisance and shall be subject to abatement as such. . . . "

Respondents and cross-appellants contend that these statutes are a valid exercise of the police power of the state to preserve its fishery resources for the common welfare of its citizens and must be complied with before appellant can proceed with the construction of its project.

In order to pass upon the validity of these state laws, it is necessary to review in some detail the provisions and constitutional background of the Federal water power act.

In 1920, Congress passed that act, which created the Federal power commission, with authority to license projects to develop the navigable waters of the United States. This was a major undertaking and was the outgrowth of a widely supported effort of the conservationists to secure enactment of a comprehensive plan of national regulation which would promote the integrated development of the water resources of the nation, to the extent that it was within the Federal power to do so. *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 90 L. Ed. 1143, 66 S. Ct. 906 (which is the leading case on this subject to which extended reference will be made later).

The Federal water power act of 1920, as amended, was incorporated into the Federal power act in 1935. (16 U. S. C. A. §§ 791a-823.) The sections of the act which are particularly pertinent to the present controversy are set forth below.

Section 3 of the act (16 U. S. C. A. § 796) defines certain words, including "licensee," "municipality," "navigable waters," and "municipal purposes," which have a bearing upon our present problem.

Section 4 (16 U. S. C. A. § 797), defining the commission's authority and powers, provides in subsection (e):

"(e) To issue licenses to citizens of the United States or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: . . ."

Section 9 (16 U. S. C. A. § 802), prescribing information to be furnished the power commission by the applicant, includes in subsection (b) the following:

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter."

Section 10 (16 U. S. C. A. § 803) provides the conditions upon which a license shall be issued by the power commission. Subsection (a) provides:

"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the

Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

Section 23(b) (16 U. S. C. A. § 817) so far as is pertinent reads:

". . . Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. . . ."

Section 27 (16 U. S. C. A. § 821) contains the following provisions:

"Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

The Federal power act was considered by the supreme court of the United States in *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. Ed. 243, 61, S. Ct. 291, where the extent of the control of the Federal govern-

ment over navigable streams was defined. The attorneys general of forty-one states (including the state of Washington) filed a brief as *amici curiae,* in which they contended that the power of the government to control the erection of structures in such streams did not include the power to prescribe conditions not related to navigation. The court stated the relationship between Federal and state control over navigable streams to be as follows:

"The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution. 'The Congress shall have Power . . . To regulate Commerce . . . among the several States.' It was held early in our history that the power to regulate commerce necessarily included power over navigation. To make its control effective the Congress may keep the 'navigable waters of the United States' open and free and provide by sanctions against any interference with the country's water assets. It may legislate to forbid or license dams in the waters; its power over improvements for navigation in rivers is 'absolute.'

"The states possess control of the waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers.' It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters."

The court upheld the conditions in the license to which objection had been made and again referred to the power of the government, saying:

"The respondent is a riparian owner with a valid state license to use the natural resources of the state for its enterprise. Consequently it has as complete a right to the use of the riparian lands, the water, and the river bed as

can be obtained under state law. The state and respondent, alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce. The power flows from the grant to regulate, i.e., to 'prescribe the rule by which commerce is to be governed.' This includes the protection of navigable waters in capacity as well as use. This power of Congress to regulate commerce is so unfettered that its judgment as to whether a structure is or is not a hindrance is conclusive. Its determination is legislative in character. The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.

"Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license. This power is exercised through § 9 of the Rivers and Harbors Act of 1899, [33 USCA § 401], prohibiting construction without congressional consent and through § 4 (e) of the present Power Act, [16 USCA § 797 (e)]. . . .

"The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that 'its exercise is attended by the same incidents which attend the exercise of the police power of the states.' The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment."

Appellant argues that chapter 9, Laws of 1949, §§ 46 and 49 of chapter 112, Laws of 1949, and other related statutes are in direct conflict with § 10 (a) of the Federal power act requiring the project adopted to be "*such as in the judgment of the Commission will be best adapted to a comprehensive plan . . . for the improvement and utilization of waterpower development, and for other beneficial public uses.*"

Chapter 9, Laws of 1949, purports to (1) prohibit the building of any dam of a height greater than twenty-five feet and (2) prohibit the diversion of waters for any purpose other than fisheries, upon the Cowlitz river.

Section 46 of chapter 112 purports to authorize the supervisor of hydraulics to refuse to issue a permit to divert water, or any hydraulic permit of any nature, if in the opinion of cross-appellants the issuance thereof might result in lowering the water in any stream below the flow necessary to support the food and game fish population.

Section 47 of chapter 112 purports to require the owner or person in charge of a dam or other obstruction to provide such fish ladders or fishways as the director of fisheries may approve.

Section 48 of chapter 112 purports (in the event that the director of fisheries determines that fish ladders and fishways are impracticable) to require the person or agency who desires to build a dam or other hydraulic project to (1) convey to the state a site or sites satisfactory to the director of fisheries, erect thereon fish hatcheries suitable to the director, and provide the money necessary for operation and maintenance, or (2) pay to the state such money as the director may determine is necessary to expand, maintain, and operate additional facilities at existing hatcheries.

Section 49 of chapter 112 purports to require the written approval of cross-appellants as to the adequacy of plans

and specification for protection of fish life and as to the propriety of the proposed project and time of construction thereof in relation to fish life, before construction of the project is commenced.

Violations of §§ 47, 48 and 49 are declared to be gross misdemeanors and penalties are provided.

It is obvious that compliance with the fish sanctuary act would force abandonment of the Cowlitz power development project by appellant, and that compliance with these provisions of the Fisheries code would give cross-appellants a veto power over the power commission's right to issue appellant a license for its construction. Hence, the two state laws are in direct conflict with the Federal act, in so far as this project is concerned.

Respondents and cross-appellants, on the other hand, contend that these laws were passed for the express purpose of preserving the fisheries resources of the state and are a valid exercise of the police power. They point out that it has often been held that a state may validly enact regulations for the preservation of game and fish in the exercise of the police power. *Skiriotes v. Florida*, 313 U. S. 69, 85 L. Ed. 1193, 61 S. Ct. 924; *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 73 L. Ed. 147, 49 S. Ct. 1; *State v. Towessnute*, 89 Wash. 478, 154 Pac. 805; *State ex rel. Campbell v. Case*, 182 Wash. 334, 47 P. (2d) 24.

It may be conceded that fish in the waters of the state belong to the people of the state in their sovereign capacity, that the legislature may permit or prohibit the taking thereof, and that the Federal government has no ownership of, or power to regulate the taking of, fish in navigable waters. See *Davis v. Olsen*, 128 Wash. 393, 222 Pac. 891. Nevertheless, where these state laws are in direct conflict with the Federal power act, they are invalid under the terms of the supremacy clause contained in article VI of the United States constitution. This provision reads:

"This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Where, as here, the state and Federal acts cannot be reconciled or consistently stand together, the action of a state even under its police power must give way. The language used by the court in *Morris v. Jones*, 329 U. S. 545, 91 L. Ed. 488, 67 S. Ct. 451, 168 A. L. R. 656, relating to an analogous situation, is applicable to this case. It was there said:

"This is to argue that by reason of its police power a State may determine the method and manner of proving claims against property which is in its jurisdiction and which is being administered by its courts or administrative agencies. We have no doubt that it may do so except as such procedure collides with the federal Constitution or an Act of Congress. See *Broderick v. Rosner*, 294 U. S. 629. *But where there is such a collision, the action of a State under its police power must give way by virtue of the Supremacy Clause.* Article VI, Clause 2. There is such a collision here." (Italics ours.)

But respondents and cross-appellants argue that, assuming the supremacy of the Federal power act, Congress in enacting it did not intend to exclude the state from exercising jurisdiction and control over the fisheries resources of the state. In support of their argument that appellant must comply with the state laws protecting the fisheries resources, they cite §§ 9 (b) and 27 of the Federal power act, which we have quoted above.

Because we are of the opinion that the principal issues of law involved in this case (both as to the constitutional question and the correct interpretation of § 9 (b) and § 27 of the act) are controlled by the decision of the supreme court of the United States in *First Iowa Hydro-Electric*

Cooperative v. Federal Power Commission, supra, we will discuss this case in some detail.

In that case, the Cooperative had applied to the power commission for a license to construct a dam on the Cedar river near Moscow, Iowa, and divert all of the water (except about twenty-five second feet) from the river bed below the dam by means of an eight mile diversion canal to Muscatine on the Mississippi river, where a hydro-electric plant was to be constructed. This was a radical change. In its natural state, the Cedar river continued to flow southeasterly from the dam site for a distance of twenty-nine miles, where it flowed into the Iowa river, which, in turn, after traveling an equal distance, flowed into the Mississippi river about twenty miles below Muscatine.

After the power commission made its jurisdictional findings, the state of Iowa intervened and opposed the granting of a license on the ground that the Cooperative had no permit from the executive counsel of the state as required by the Iowa statute. The Cooperative had applied for such permit and it had been denied by the executive council.

The two sections of the 1939 Code of Iowa, which were the principal basis of the state's objection to the issuance of a license by the power commission, provided:

"7767. Prohibition-permit. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same."

"7771. When permit granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the

nearest practicable place *without being* materially diminished in quantity or polluted or *rendered deleterious to fish life*, it shall grant the permit, upon such terms and conditions as it may prescribe." (Italics ours.)

It was the state's contention that, under § 9 (b) and § 27 of the Federal power act, an applicant was required to comply with state laws before being entitled to the issuance of a license from the power commission. The power commission sustained the state's position and denied the Cooperative a license.

The case in due course was considered on certiorari by the supreme court of the United States, which overruled the contentions of the state of Iowa and remanded the matter to the power commission for further proceedings in conformity with the court's opinion.

The court interpreted the provisions of the Federal power act and concluded that chapter 363 (now chapter 469) of the Code of Iowa, and especially §§ 7767 and 7771, as quoted above, need not be complied with by an applicant for a Federal license. The court said:

"In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. In fact a contrary policy is indicated in §§ 4 (e), 10 (a), (b) and (c), and 23 (b). In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission. A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be

unworkable. 'Compliance with the requirements of such a duplicated system of licensing would be nearly as bad. Conformity to both standards would be impossible in some cases and probably difficult in most of them. The solution adopted by Congress, as to what evidence an applicant for a federal license should submit to the Federal Power Commission, appears in § 9 of its Act. It contains not only subsection (b) but also subsections (a) and (c). Section 9 (c) permits the Commission to secure from the applicant 'Such additional information as the commission may require.' This enables it to secure, *in so far as it deems it material*, such parts or all of the information that the respective States may have prescribed in state statutes as a basis for state action. The entire administrative procedure required as to the present application for a license is described in § 9 and in the Rules of Practice and Regulations of the Commission."

The following language answers respondents' and cross-appellants' contention that appellant must comply with the fish sanctuary act and the Fisheries code of 1949 in order to construct the Cowlitz development:

"The securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a federal license. It is a procedure required by the State of Iowa in dealing with its local streams and also with the waters of the United States within that State in the absence of an assumption of jurisdiction by the United States over the navigability of its waters. Now, that the Federal Government has taken jurisdiction of such waters under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements. . . .

"The Act leaves to the States their traditional jurisdiction subject to the admittedly superior right of the Federal Government through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States. These sources of constitutional authority are all applied in the Federal Power Act to the development of the navigable waters of the United States.

"The closeness of the relationship of the Federal Government to these projects and its obvious concern in maintaining control over their engineering, economic and financial soundness is emphasized by such provisions as those of § 14 authorizing the Federal Government, at the expiration of a license, to take over the licensed project by payment of 'the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken,' plus an allowance for severance damages. The scope of the whole program has been further aided, in 1940, by the definition given to navigable waters of the United States in *United States v. Appalachian Power Co.*, 311 U. S. 377. 'Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons v. Ogden*, 9 Wheat. 1, to *United States v. Appalachian Power Co.*, 311 U. S. 377.' *Northwest Airlines v. Minnesota*, 322 U. S. 292, 303. . . .

"As indicated by Representative LaFollette, Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of the constitutional rights of the States so as to sustain the validity of the Act. The resulting integration of the respective jurisdictions of the State and Federal Governments is illustrated by the careful preservation of the separate interests of the States throughout the Act, without setting up a divided authority over any one subject.

"Sections 27 and 9 are especially significant in this regard. Section 27 expressly 'saves' certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act. It provides:

"'Sec. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.' 41 Stat. 1077, 16 U. S. C. § 821.

"Section 27 thus evidences the recognition by Congress of the need for an express 'saving' clause in the Federal Power Act if the usual rules of supersedure are to be overcome. Sections 27 and 9 (b) were both included in the original Federal Water Power Act of 1920 in their present form. The directness and clarity of § 27 as a 'saving' clause and its location near the end of the Act emphasizes the distinction between its purpose and that of § 9 (b), which is included in § 9, in the early part of the Act, which deals with the marshalling of information for the consideration of a new federal license. In view of the use by Congress of such an adequate 'saving' clause in § 27, its failure to use similar language in § 9 (b) is persuasive that § 9 (b) should not be given the same effect as is given to § 27.

"The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase 'any vested right acquired therein' further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words 'other uses.' Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. This was so held in an early decision by a District Court, relating to § 27 and upholding the constitutionality of the Act, where it was stated that 'a proper construction of the act requires that the words "other uses" shall be construed ejusdem generis with the words "irrigation" and "municipal."' *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, 619.

"This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus 'saved' to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course."

The Federal power act, as construed in the *Appalachian Electric* case, *supra*, and the *First Iowa* case, is

the supreme law of the land and, under the supremacy clause (Art. VI, U. S. constitution), is binding upon this court. On the authority of those decisions, we must hold that Congress had the constitutional power to enact the Federal power act and that, in doing so, it intended to exercise its full jurisdiction to authorize the power commission to supersede state laws purporting to prohibit or limit the construction of dams on navigable streams. By passing the act, Congress pre-empted the entire field and authorized the power commission to issue licenses for such construction upon such conditions as it deemed proper.

After the decision of the supreme court in the *First Iowa* case, *supra*, the matter was remanded to the Federal power commission, which thereafter granted the license applied for. This action was reviewed by the circuit court of appeals for the eighth circuit in *Iowa v. Federal Power Commission*, 178 F. (2d) 421. In that case, the state contended, *inter alia*, that the issuance of the license was invalid because the power commission had failed to give adequate consideration to the effect of the project on wildlife resources as required by the act of Congress of August 14, 1946. One of the conditions of the license was that:

"'The licensee shall construct, maintain and operate such fish protective devices and shall comply with such reasonable conditions in the interest of fish life as may be hereafter prescribed upon the recommendation of the Secretary of the Interior.'"

The court denied the state's petition to set aside the power commission's order granting the license, saying as to the state's contention:

"The Commission in its brief points out that, in the hearings held prior to the enactment of the Act of August 14, 1946, the Iowa Conservation Commission, as intervener, appeared and produced evidence 'with regard to fish life in the area and the probable effect of the project thereon.' Apparently, the views of the State Conservation Commission were received and considered by the Federal Power

Commission. Moreover, under the terms of the license, the applicant may still be required to do whatever may be reasonable for the protection of fish life. The defects, if any, in the Commission's proceedings relative to the protection of wildlife resources could not, in our opinion, be regarded as sufficiently vital or prejudicial to justify a vacation of the orders under review."

While it has no bearing upon the issues in this case, it may be of interest to those concerned about the preservation of anadromous fish life on the upper Cowlitz river that the power commission, as it did in the case of *Iowa* v. *Federal Power Commission*, *supra*, has placed in appellant's license conditions dealing with protection of fish life. These conditions read:

"*Article 30.* Before beginning the construction of any permanent fish ladders, fish traps or other fish handling facilities, or fish protective devices, the Licensee shall make further studies, tests and experiments to determine the probable effectiveness of such facilities and devices and shall submit plans therefor and obtain Commission approval. In making such studies, tests and experiments and in the preparation of final design plans, the Licensee shall cooperate with the United States Fish and Wildlife Service and the Departments of Fisheries and Game of the State of Washington. The Licensee shall continue its studies and investigations with respect to its proposed program of stream improvement and hatchery facilities. The Licensee shall submit quarterly reports to the Commission of its activities hereunder."

"*Article 31.* The Licensee shall construct, maintain and operate such fish ladders, fish traps or other fish handling facilities or fish protective devices and make such stream improvements and provide such fish hatcheries and similar facilities and comply with such reasonable modifications of the project structures and operation in the interest of fish as may be prescribed hereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior."

Furthermore, Congress since 1946 has required the Federal power commission to

". . . consult with the Fish and Wildlife Service and the head of the agency exercising administration over the wildlife resources of the State wherein the impoundment, diversion, or other control facility is to be constructed with a view to preventing loss of and damage to wildlife resources. . . ." (60 Stat. 1080, 16 U. S. C. A. (Sup.) § 662)

It is vigorously asserted by respondents and cross-appellants that appellant, being a municipal corporation created by the state, may not defy the laws of its creator In other words, assuming that appellant ever had the power to construct dams on rivers resulting in the destruction of fish life, it is contended that the legislature has taken that right away with respect to the Cowlitz river by enacting the fish sanctuary act (Chap. 9, Laws of 1949).

The legislature must be presumed to have known when enacting that law that, for at least forty years, all classes of municipal corporations had been authorized by it to operate certain public utilities. *Hutton v. Martin*, 41 Wn. (2d) 780, 252 P. (2d) 581. As last amended in 1947, the pertinent statute, (Rem. Supp. 1947, § 9488 [*cf.* RCW 80.40.030]) included power to:

"Construct, condemn and purchase, purchase, acquire, add to, maintain and operate works, plants and facilities for the purpose of furnishing such city or town and the inhabitants thereof, and any other persons, with gas, electricity and other means of power and facilities for lighting, heating, fuel and power purposes. . . ."

In *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199, appellant was seeking to condemn property for power purposes upon a petition alleging:

" 'That at all times since the year 1893 the city of Tacoma has been engaged in the business of owning, operating and maintaining works, plants and facilities for the purpose of furnishing said city and the inhabitants thereof with electricity and facilities for lighting, heating, fuel and power purposes, public and private.' "

This would seem to indicate that appellant for about sixty years has been engaged in the business of producing and selling electric power.

In *Tacoma* v. *State*, 121 Wash. 448, 209 Pac. 700, appellant was permitted to condemn state land for the purpose of constructing a dam as part of a hydroelectric project. The state contended that the city's diversion of the water of a certain stream would destroy or damage the propagation of food fish. After referring to the "broad powers conferred upon cities by our statute, Rem. Comp. Stat., § 9488," this court answered the state's objection to this condemnation of its rights as follows:

"The contention that the diversion of the waters will destroy or seriously damage the propagation of food fish, we cannot find to be sustained by a preponderance of the evidence. But even if it were, we would be reluctant to hold that the fish, by following their natural instincts, had devoted the stream to such a public purpose as would defeat the city's rights under the statutes hereinabove cited."

The passage of chapter 9, Laws of 1949, does not purport to amend or repeal Rem. Supp. 1947, § 9488. No reference whatever is made therein to municipal corporations or their right to engage in the production and sale of electric energy. It cannot be viewed as a repeal of this statute by implication.

Conceding that the legislature has the power to curtail or abolish appellant's present authority to engage in the electric utility business, we are convinced that it has not as yet exercised such power.

The Federal power act defines the term municipal corporation and authorizes the power commission to issue a license to such an entity. Appellant has complied with the state law with respect to the right of a municipality to engage in the business of developing, transmitting and distributing power. Having been granted a license by the power commission, we hold that appellant is at the present

time in the same position as any other licensee under the act. See *State ex rel. Washington Water Power Co. v. Superior Court*, 34 Wn. (2d) 196, 208 P. (2d) 849.

The further contention is made that a municipal corporation has no rights which are protected by the United States constitution. In support of this position, several cases are cited relating to the fourteenth amendment, which, in substance, guarantees to "any person" due process and equal protection of the laws, and cases relating to Art. I, § 10, prohibiting the impairment of contracts. See 116 A. L. R. 1037.

This contention is without merit because in the present case the right of appellant to proceed with the construction of this project is based on the Federal power act, which, in turn, is based on the commerce clause of the Federal constitution. Fundamentally, it is the United States whose power to regulate commerce on navigable streams is primarily being questioned in this suit. Appellant's rights under its license from the power commission are governed by the Federal power act and have no relation to the fourteenth amendment nor to Art. I, § 10, of the Federal constitution.

Since we have found that the two state laws involved in this case *to the extent that they are in conflict with* the Federal power act are inoperative, we do not deem it necessary to pass upon appellant's other contentions that these laws violate certain provisions of the state constitution and are invalid *in toto*.

Paraphrasing the language of the supreme court in concluding its opinion in the *First Iowa* case, *supra*, we hold that:

It is the Federal power commission rather than the director of fisheries and the director of game of the state of Washington which under our constitutional government must pass upon the measures necessary for the protection

of anadromous fish in the navigable streams in this state on behalf of the people of Washington as well as on behalf of all the people of the United States.

Without further extending this opinion, we deem it sufficient to state that, for the several reasons above set forth, we are of the opinion that appellant's complaint states a cause of action, and that, on the basis of the facts alleged therein, appellant, has a valid license issued by the power commission for the construction of the Cowlitz power development and that the utility bonds authorized by ordinance No. 14386 have not been shown to be invalid in any respect.

On appellant's appeal, the judgment dismissing its complaint is reversed, with instructions to overrule the demurrer thereto and to proceed further in this case consistently with the views expressed herein.

With respect to the cross-appeal, the trial court's order dismissing appellant's complaint recited that it was not necessary "to rule or pass upon plaintiff's demurrer to said cross-complaint.". Since the trial court did not pass upon that question or enter any final order regarding that issue, there is nothing for this court to review on the cross-appeal. Accordingly, it must be, and hereby is, dismissed.

MALLERY, SCHWELLENBACH, FINLEY, WEAVER, and OLSON, JJ., concur.

HAMLEY, J. (dissenting)—In my opinion, the enactment of Laws of 1949, chapter 9, p. 38 [*cf.* RCW 75.20.010, .020, .030], represents the exertion of two distinct powers of state government—the police power of the state to preserve its fishing resources, and the power to define and control the functioning of subordinate units of government.

In so far as chapter 9 is sought to be applied as an exercise of police power, it may or may not have been super-

seded by the Federal power act, a question we need not now decide. In so far as chapter 9 is sought to be applied as an exercise of the power of the state over subordinate units of government, it has not been superseded. The Federal government may not confer corporate powers upon local units of government, and the Federal power act does not purport to do so. The supersedure, if any, with respect to the exertion of police power, does not affect applicability of chapter 9 as an exercise of the other power named, for, in my view, the legislature would have intended the act to remain in force in the latter regard had the matter of supersedure been called to its attention.

That the legislature may restrict the powers of municipalities, is beyond question. Cities are limited governmental arms of the state. *Russell v. Grandview*, 39 Wn. (2d) 551, 236 P. (2d) 1061. They may exercise only those powers which are granted to them in the state constitution or statutes. Except as limited by the constitution, legislative control over municipalities is therefore plenary. *State v. Aberdeen*, 34 Wash. 61, 74 Pac. 1022; *Wheeler School Dist. v. Hawley*, 18 Wn. (2d) 37, 137 P. (2d) 1010. It follows that the legislature may enlarge or diminish powers already granted to such subordinate units of government. *State ex rel. Nat. Bank of Tacoma v. Tacoma*, 97 Wash. 190, 166 Pac. 66. Needless to say, the wisdom of any restriction which the legislature determines to place upon the corporate powers of municipalities is not an issue in this court.

That the legislature intended Laws of 1949, chapter 9, to restrict the corporate powers of municipalities with regard to the construction of the dams in question, seems clear to me. Under Rem. Supp. 1947, § 9488 [*cf.* RCW 80.40.010 *et seq.*], incorporated cities or towns are authorized and empowered to erect and build dams or other works across or at the outlet "of any lake or water course in this state." If that corporate power were left undisturbed, the whole purpose of the fish sanctuary act would be defeated.

Hence, when, in chapter 9, the legislature forbade the construction of any dam of a height greater than twenty-five feet on "all streams and rivers tributary to the Columbia River downstream from McNary Dam," it by implication amended or partially repealed Rem. Supp. 1947, § 9488, so as to restrict, to that extent, the corporate powers granted by the latter statute.

I recognize that repeals of statutes by implication are not favored, and to so work a repeal the implication must be a necessary one. *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092; *Generaux v. Petit*, 172 Wash. 132, 19 P. (2d) 911. But, where the subsequent legislation is contrary to, and inconsistent with, a former act, a repeal by implication is effected. *Peterson v. King County*, 199 Wash. 106, 90 P. (2d) 729. Here the conflict between Rem. Supp. 1947, § [illegible]88, permitting municipal corporations to construct dams for stated purposes across or at the outlet of "any lake or water course in this state," and Laws of 1949, chapter 9, forbidding the construction of dams of a greater height than twenty-five feet on certain water courses, is patent—they cannot both stand.

Appellant argues that the provisions of chapter 9 are not separable, and that if that chapter is superseded to any extent, it is thereby rendered wholly void.

The question here is not whether part of the statute is enforcible where the remainder has been declared invalid (as in all cases cited by appellant), but whether all of the act is enforcible as to incorporated municipalities if it is found to be unenforcible and void as to other persons and corporations.

The doctrine of separability has most frequently been applied to statutes of which one or more sections were valid and other sections, relating to other subjects, were unconstitutional. However, the rule is not limited to such instances, and when, as here, the same provision of the statute affects different classes of persons or corporations,

as to some of which it is valid, and as to others of which it may be invalid, the valid applications of the statute may be held enforcible. *State v. Bevins,* 210 Iowa 1031, 230 N. W. 865; *Robert Dollar Co. v. Canadian Car & Foundry Co.*, 220 N. Y. 270, 115 N. E. 711. In the latter case, no question as to the workability of part of a statute is presented, but there does remain the question of whether the legislature would have passed the statute knowing that it would have only its limited application. *Robert Dollar Co. v. Canadian Car & Foundry Co., supra; State v. Bevins, supra.* For a discussion of the difference between these two kinds of separability problems, see 2 Sutherland Statutory Construction (3d ed.) 175, 190-194, §§ 2402, 2413-2416.

In my view, the legislative history of chapter 9 indicates that the legislature would have restricted the corporate powers of municipalities in the respect indicated; even had it then believed that, as to persons and corporations other than incorporated municipalities, the state could not prohibit the building of such structures.

Chapter 9 was introduced as S. B. 4. After it had passed the Senate and when it was on second reading in the House, Representative William D. Shannon moved the adoption of an amendment which would have excluded from the operation of the act "the waters of the Cowlitz River lying East of Range 1 East of the Willamette Meridian." House Journal, page 215. During the debate which then ensued on this amendment, the following colloquy occurred:

"Mr. Carty: 'Mr. Speaker, I would like to ask Mr. Shannon a question.' The Speaker: 'Will the gentleman yield?' Mr. Shannon: 'Yes.' Mr. Carty: 'Just what area of this proposed dam would this line drawn in your amendment cross?' Mr. Shannon: 'A mile and a half below the Mayfield Dam.' Mr. Carty: 'Then the purpose of this amendment would be to make this act ineffective?' Mr. Shannon: 'In my opinion, it wouldn't. It would make a fish sanctuary on all of the lower part of the Cowlitz

River; on all the tributaries below the Mayfield Dam, about twenty miles from the Columbia River up.' "

As indicated in the majority opinion, the Mayfield dam is one of the two projects here in question, the other being further upstream on the same river. The purpose of Mr. Shannon's amendment, therefore, was to exclude from the act that portion of the Cowlitz river on which these two dams are sought to be constructed. After this information was disclosed during the exchange quoted above, Mr. Shannon's amendment was laid on the table and the bill was passed in its present form.

It therefore appears that the prime purpose of chapter 9 was to forestall construction of the very dams involved in this case. Nothing in the act, nor in its legislative history, indicates that the legislature intended to give ground any more than it was compelled to in enforcing the stated policy of protecting anadromous fish life in the rivers and streams tributary to the lower Columbia river. While the construction of high dams by any person or corporation would defeat that purpose, the plan of appellant city to construct the dams in question offered the real threat.

Appellant also argues that chapter 9 was enacted in violation of the Washington constitution, Art. II, § 19, pertaining to the subjects to be embraced in a bill, and the form of title; and in violation of Art. II, § 1, which vests legislative power in the Senate and House of Representatives. In my opinion, these contentions are without merit, but no useful purpose will be served by discussing them in this dissenting opinion.

I would affirm the judgment.

HILL, J. (dissenting)—I concur in Judge Hamley's dissent. I am of the opinion, also, that a *license* from the Federal government does not give the licensee the right to disregard legislation enacted by the state of Washington in the exercise of its police power.

GRADY, C. J., concurs with HAMLEY and HILL, JJ.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Project No. 2016

In the Matter of

CITY OF TACOMA, WASHINGTON

Opinion No. 221

BY THE COMMISSION:

The City of Tacoma, a municipality in the State of Washington, on December 28, 1948 filed an application for a license under Section 4 (e) of the Federal Power Act for authority to construct, operate, and maintain the Mossyrock and Mayfield developments on the Cowlitz River in Lewis County, Washington, designated as Project No. 2016.

The Mossyrock dam would be located at about river mile 65 and the Mayfield dam at about river mile 52. The Mossyrock power plant would have an initial power installation of three generating units of 75,000 kilowatts each, with provision for a fourth unit of the same size. The initial installation at Mayfield would be three 40,000-kilowatt units with provision for a fourth unit of the same size, thus giving the two plants a combined capacity of 460,000 kilowatts. Thus, these two plants would add 190 percent to the present capacity of the Tacoma generating plants and nearly 10 percent to the present combined total installation of 4,700,000 kilowatts in the Pacific Northwest power pool. Three years would be required after authorization before the proposed plants could be placed in operation, this project being one of the most readily available sources of power in the Pacific Northwest.

Since the City of Tacoma's generating, transmission and distribution system is already interconnected with the other public and privately-owned power plants operating in the Pacific Northwest power pool, the addition of these sizable units west of the Cascade Mountains would be of benefit to all of the power consumers in the area, particularly as a diversity of rainfall on both sides of the Cascades would enable the City to firm up some of the other developments operating in the power pool, especially during the winter months when the power load is highest. In addition, these plants would be located within a relatively short transmission distance from Tacoma, Seattle and Portland, the heavy load centers in the area.

The severe power shortage in the Pacific Northwest is a matter of national concern, particularly when every effort is being made to increase the industrial output and the output of those materials calling for large blocks of low-cost power, and of course the principal increase in the power demands of the area has been due to the expanding defense requirements which must be met. Furthermore, the serious regional power shortage in this area will not be met by the planned Federal power construction, but additional generating plants must be built as rapidly as possible, especially where, as here proposed, the installation can be made with a minimum loss of time and with maximum assistance to other power suppliers.

On the other hand, Section 10 (a) of the Federal Power Act requires that licenses shall be issued only for those power projects which in the judgment of the Commission are best adapted to comprehensive plans for full development of those streams subject to Federal jurisdiction and, of course, other benefits than power production may be secured by utilization of streams in their natural state or through improvements. The engineering possibility of realizing the anticipated power benefits from the proposal

of the City is not to be seriously questioned, nor is it denied that large flood control and incidental navigation benefits would result. However, the Cowlitz River is extensively used for spawning by anadromous fish, and the City is confronted by those who contend that this natural river use will be completely destroyed by the proposed dams.

The Mossyrock dam would be about 510 feet in height and the Mayfield dam about 240 feet in height, both above bedrock, and it is said that anadromous fish would be unable to reach the pools above the dams, particularly the higher of the two, during the spawning season, nor could the small fingerlings find their way downstream. Fish ladders having a vertical ascent of 65 feet are in operation at the Bonneville dam and the same facilities are planned at the McNary dam just upstream to make possible an ascent of 92 feet, but no fish ladders over 200 feet in height have been installed at any other dam. Furthermore, it is said, the other fish handling facilities and conservation measures proposed by the City will not be effective and the present valuable fishery resources will be destroyed.

In addition to offering physical obstacles to fish passage upstream and downstream, the State Attorney General, the Department of Fisheries and Game, and the Washington State Sportsmen's Council, Inc., object to the proposed dams on legal grounds. They argue that the application should be denied because construction of any dam greater than 25 feet in height is forbidden by the State Columbia River Sanctuary Act in any tributary of the Columbia downstream from the McNary dam and within the migratory range of anadromous fish. We recognize, of course, that any State statute represents an expression of the intention of the Legislature by which it was enacted, but since we are dealing here with the applicability of a

Federal statute it is equally clear that a State statute cannot stand as a complete legal bar to authorization of a State prohibited project if in the judgment of the Commission that project is best adapted to comprehensive plans and would be of unmistakable public benefit. We should not, merely in reliance upon the State Sanctuary Law, attempt to escape responsibility for considering the broader public interest questions before us under the Federal Power Act.

Another bar to approval of the application suggested by the interveners, and apparently relied upon by the Examiner, is the Columbia River Review Report submitted in 1948 by the United States Army Corps of Engineers. This is presented to us as a specific recommendation for indefinite postponement of any water-power development on the Cowlitz River because that river was included in the Lower Columbia Fisheries Plan prepared by the United States Fish and Wildlife Service in cooperation with the Fish and Game Commissions of the States of Washington, Oregon and Idaho, and because the Army Engineers were said to be of the opinion that the Cowlitz River was needed as a spawning area for fish and that there was an adequate supply of electric power available elsewhere in the Columbia Basin.

We note initially in this connection that while Congress has appropriated funds for certain of the developments included in the 1948 report it has not given its approval to the Lower Columbia Fisheries Plan nor to the basin plans of the Army Engineers. The current views of the Chief of Engineers were expressed in his report to this Commission under Section 4 (e) of the Federal Power Act on the application of the City of Tacoma for a license for Project No. 2016. In reporting to the Commission the Chief of Engineers says that no recommendation had been made in the Review Report for development of the Cowlitz

sites because of the interest of local communities in undertaking such development and because of the need for correlation of power development by local interests with the needs of preservation of the fishery resources. In other words, in 1948 the Chief of Engineers recognized the local interest of the City of Tacoma in development of the Cowlitz, which would render Federal investments unnecessary, and he was of the opinion that the power supply was then adequate. As we now see, the power supply is presently inadequate and the City of Tacoma desires to proceed.

The comments of the Commission upon the 1948 Review Report were, of course, directed principally to the power features of the plan there submitted. The Commission has neither the responsibility nor the necessary staff for making an independent evaluation of other uses than power in commenting upon such comprehensive plans of the Army Engineers as were submitted in 1948 and it made no attempt at that time to weigh the merits of the proposal of the United States Fish and Wildlife Service to postpone consideration of the development of those streams tributary to the lower Columbia River. Since the Army Engineers did not then propose Federal development of the Cowlitz River, the Commission was justified in taking the recommendations of the Fish and Wildlife Service at their face value. Upon the filing of the instant application, however, the responsibilities assigned to the Commission under the Federal Power Act made impossible any further postponement of consideration of the development of the Cowlitz River and required full and impartial evaluation of the applicant's proposal on its merits and the objections thereto, including full opportunity to all Federal and State agencies in any way interested in the proposal to present their views and relevant information in support of their recommendations.

This leaves for discussion the claims of the applicant and of the fishery interests with respect to the fishery resources of the Cowlitz River upstream from the Mayfield dam, the effects reasonably to be anticipated from construction of the proposed dams, and the economic and public benefits under natural conditions and with the improvements proposed by the City.

Since the stream discharge below the Mayfield dam would be smoothed out seasonally to a substantial degree, there would not appear to be any jeopardy to the fish population below that dam if the construction proposed is undertaken. In fact, the evidence indicates that there may be an increase in those fishery resources. The daily power operations at Mayfield should be such as not to injure the fish, and we should reserve the right to consider this situation from time to time as occasion arises.

The important anadromous fish inhabiting the Cowlitz watershed are the spring chinook, fall chinook, silver salmon, the steelhead and cutthroat trout, and the smelt.

The salmonoids and the smelt perish after spawning while the sea-run trout spawn several times before dying. Each race of the anadromous fish of Cowlitz River watershed utilize spawning areas suitable to its ecological niche and each has well defined migratory and spawning habits of its own. The anadromous fish use the fresh water of the Cowlitz River for spawning purposes and early rearing of the young, the greater portion of their growth and life being associated with the sea. Most of the anadromous fingerlings migrate to sea during the spring of the year. The effect of man-made changes and of pollution on the fish has been adverse to some degree. The reduction of pollution through increase in low water flow, as proposed by the applicant, should be beneficial.

The Examiner made certain findings as to the gross and net values of the fish using the Cowlitz River, and while

there may be some question as to the actual values, we are adopting his findings for the purpose of our analysis, since the values which he adopted appear to be ample. Although the values assigned to the recreational aspects of the fishing may be in part conjectural, the commercial fishing values have a fairly substantial foundation. In any event, we are convinced that the Cowlitz is an important fishery stream in the Columbia River system and our inquiry into the possibility of loss of any portion of these natural resources has been upon the assumption that whatever the actual values may be, they are of material importance to the people of the area and should not be lightly brushed aside.

Although the sports fishery, constituting a form of recreation has been evaluated in monetary terms, a suggestion has been made that it may in addition have substantial intangible values. The fact that such recreation may have intangible values does not mean that they are large or significant and there is no basis for assuming that they outweight the rather tangible and large flood control, navigation and power benefits which can result from the improvements proposed. In this particular region, as in many other sections of Washington and Oregon, there are many recreation areas of the sports fishery type and we are not faced with a unique situation as was the case when we required a substantial power loss at a Kern River dam in California in order to provide recreational advantages which could not otherwise be obtained. Therefore, there is no substantial basis for holding that the sports fishery in the upper Cowlitz has any significant intangible recreational values. Furthermore, the proposed reservoirs undoubtedly will offer other types of recreational opportunities similiar to those afforded at other large reservoir projects in other streams, so that there should not be a total loss of recreational values as apparently suggested.

There would not be too much of an anadromous fishery problem at these and similar dams if means could be found for passing the adult migrants upstream and the fingerlings downstream. To get the adult fish by the dams for spawning in the upstream areas, the City proposes to construct fish ladders and also to provide trapping and hauling facilities, so that they may reach natural spawning grounds. As a complement to the other fish protection measures, both as related to upstream and downstream migrations, the City proposes to construct and operate extensive fish hatchery facilities for artificial propagation of the fish and development of fingerlings capable of making the migrations to the sea.

The testimony does not show that fish ladders of the heights proposed, 185 feet of ascent in one case and 325 feet in the other, would be fully effective, and of course no one can tell until a test has been made and actual conditions studied. Also details of construction must be worked out, such as entrance ways and attraction water for the fish ladder, the use of resting pools and the design of adequate means to pass the fish into the Mossyrock reservoir at different elevations of water. However, in this respect, as in connection with the other fish protective measures proposed, the details have yet to be worked out. With suitable design to permit a wide range of operating variations to meet situations reasonably to be anticipated, there would be provided here a full-scale laboratory for research and experimentation by means of which the answers to many perplexing problems of fish protection and propagation can be obtained. The recommendation of the Examiner for denial of the license until the City completes further experimentation at its own expense does not appear to offer a practical solution to the problem, especially when there would be no assurance that the City would be given final authorization without many years of

further study. Also, this recommendation would seem to rest upon the assumption that none of the measures proposed at this time would be of material assistance in saving the fish runs, an assumption which is not supported by the record.

It has been asserted that by the time satisfactory evidence can be obtained as to the success of the fishery conservation facilities proposed by applicant, the fishery resources may well be reduced to insignificance. Being cognizant of this possibility, we propose that the hatchery facilities be provided soon enough to assure initially maintenance of a sizable seed stock and later to complement the natural productivity above the dams. The use of fish hatcheries has been particularly successful in connection with runs of fall chinook and silver salmon, which constitute about 70 percent of the total commercial fish and about 60 percent in value of the commercial and sport fish. Furthermore, a substantial portion of the $20 million proposed for Federal expenditure in the Columbia River fisheries plan, probably almost half of the total sum, is to be spent for construction of fish hatcheries and related facilities. This would seem to be an endorsement of this method of preserving anadromous fish and an indication that it should be used on the Cowlitz River.

Regardless of the details of the methods used, the record shows that adult anadromous fish are now being passed upstream by high dams successfully and that by trapping and hauling on the Cowlitz similar fish could be taken past the proposed dams reasonably satisfactorily.

While there are several biological and engineering problems to be studied in connection with the ladder system, the record clearly does not support a rejection of the proposals at this time. We recognize that the problems will differ in several details during the construction period and after the dams are placed in opera-

tion, and the best solutions must be decided upon for each period. Studies of these problems should go forward promptly and we expect the City either to employ its own biologist or to make suitable arrangements with the State of Washington for expert assistance in exploring all possible means of working out the details of this and other problems dealing with the fishery conservation facilities.

It is when we come to the facilities proposed by the City for passing fingerlings downstream past or through the dams that the novelty of the proposal is evident. After spawning in the headwaters the adult salmon perish. The fry fish which come from eggs remain in the fresh water for several months, sometimes as long as two years, before beginning their migration downstream to salt water where their principal growth takes place. At the time of their downstream passage these fingerlings are seldom over six inches in length and the problem on streams and rivers having dams has been to provide for their passage without injury or substantial loss. Up to the present time there have been no constructive proposals for passing fingerlings downstream past dams. Usually the fingerlings make their way over spillways or through turbines and in each case there are losses.

To solve this problem in a new and untried manner, the City proposes to incorporate a system of passageways and chambers in the upper Mossyrock dam to which the fingerlings will be attracted and through which they will pass. The downstream fish passing system for the lower Mayfield dam will be much more simple as the reservoir behind it will not have a substantial fluctuation. The turbine intakes at Mossyrock and Mayfield dams would be screened off to prevent entry of any fish.

At Mossyrock dam a series of entries or ports would be provided in the upstream face of the dam through which the fish would enter a trunk passageway to a large tank and thence through other passageways being

gradually passed through the dam and released at a proper point downstream. As the flows at the penstock intakes would be only about 3,300 c.f.s. spread over a 28-foot opening, there would be a low velocity of approach and therefore the problem of screening should not be difficult of solution. If the fingerlings can be induced to enter the ports along the upstream face of Mossyrock dam, the problems of pressure and movement through the dams would be largely engineering. It is clear from the record that many details of the downstream passing facilities are yet to be worked out.

Conclusion

From our analysis of the evidence in the record and the arguments advanced on both sides we have reached the conclusion that a fair and reasonable balance can be struck. Probably not all of the present fishery values could be salvaged if the proposed dams are constructed, but certainly not all of those values would be lost as the interveners seem to contend.

We are required to consider all of the possible advantages and disadvantages of the City's proposal from the standpoint of the greatest public benefit through the use of these valuable water and other natural resources. The question posed does not appear to us to be between all power and no fish but rather between large power benefits (needed particularly for defense purposes), important flood control benefits and navigation benefits, with incidental recreation and intangible benefits, balanced against some fish losses, or a retention of the stream in its present natural condition until such time in the fairly near future when economic pressures will force its full utilization. With proper testing and experimentation by the City of Tacoma, in cooperation with interested State and Federal agencies, a fishery protective program can be evolved which will prevent undue loss of fishery values

in relation to the other values. For these reasons we are issuing the license with certain conditions which are set forth in our accompanying order.

THOMAS C. BUCHANAN,
Acting Chairman

CLAUDE L. DRAPER,
Commissioner

NELSON LEE SMITH
Commissioner

HARRINGTON WIMBERLY,
Commissioner

Dated at Washington, D. C.,
this 27th day of November, 1951.

LEON M. FUQUAY, *Secretary.*

Date of Issuance: November 28, 1951

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Thomas C. Buchanan, Acting Chairman; Claude L. Draper, Nelson Lee Smith and Harrington Wimberly.

November 27, 1951

Project No. 2016

In the Matter of

CITY OF TACOMA, WASHINGTON

Order Issuing License (Major)

Application was filed on December 28, 1948, and later supplemented, by the City of Tacoma, Washington, for a

license under the Federal Power Act for a proposed hydroelectric development, designated as Project No. 2016, to be located on the Cowlitz River in Lewis County, Washington.

A public hearing on the application was held in Washington, D. C., commencing on November 2, 1950, before an Examiner of the Commission, in which hearing all parties, including the Applicant and the Staff of the Commission, as well as two agencies of the State of Washington, the Attorney General of the State of Washington, and the Washington State Sportsmen's Council, Inc. participated, and presented testimony and documentary exhibits. In addition, the Commission itself held a portion of the hearing in Tacoma, Washington, at which all persons desiring to speak either in favor of or in opposition to the issuance of a license for the proposed project were heard. After the close of the hearing, briefs were filed by the various parties and by the Staff and a recommended decision was rendered by the Presiding Examiner containing findings and conclusions. On October 31, 1951, the Commission heard oral argument on exceptions to the Examiner's recommended decision.

For the reasons set forth in Opinion No. 221, adopted this date and made a part hereof by reference, and upon consideration of the entire record in this matter, including the reports of the Federal agencies, protests from interested citizens, the briefs of the parties filed in connection therewith, the Examiner's recommended decision and the oral argument thereon, the Commission *finds:*

(1) As previously found by the Commission, construction and operation of the two dams and reservoirs comprising proposed Project No. 2016 will affect lands of the United States; and could be so operated as to materially affect the navigable capacity of the Cowlitz River below the site of the proposed projects; and either or both of the reservoirs will affect the interests of interstate or foreign commerce.

(2) The project proposed by the Applicant will consist of two dams and appurtenant reservoirs named Mossyrock and Mayfield, respectively, located on the Cowlitz River in the State of Washington. Mossyrock, with a usable reservoir storage capacity of 824,000 acre-feet, will have an initial installed capacity of 225,000 kilowatts and an ultimate installed capacity of 300,000 kilowatts. Mayfield will have a usable reservoir storage capacity of 21,000 acre-feet, an initial installed capacity of 120,000 kilowatts, and an ultimate installed capacity of 160,000 kilowatts.

(3) The project proposed by the Applicant will have initially a plant capability varying from 345,000 kilowatts at full head to about 270,000 kilowatts, depending upon the amount of drawdown. The average dependable capacity over a 50-year period will be 275,000 kilowatts. The average annual energy output will be about 1400 million kilowatt-hours. Because of the diversity in stream flow and the large storage capacity which will be provided in the Mossyrock reservoir, a like amount of energy will also be available during a year of most adverse stream flow on the systems of the cities of Tacoma and Seattle, or on the systems of the Northwest Region.

(4) During the months of October through the following May all or a part of up to 260,000 acre-feet of the storage capacity of the Mossyrock reservoir will be reserved for temporary storage of flood waters and in most water years additional storage capacity will be available for the storage of flood waters under the plan of operation.

(5) Operation of the project in the interest of flood control will be equivalent to reducing the flood of record (December 1933) on the Cowlitz River (should it re-occur) from 140,000 cubic feet per second at Castle Rock, Washington, to 70,000 cubic feet per second (bank full capacity) at Castle Rock.

(6) Water traffic on the Cowlitz River is presently confined largely to the lower six or seven miles of its length, but the river may be navigated for some miles upstream.

(7) The project will be operated so as to increase the average minimum flow in the river between Toledo and Castle Rock, Washington, from about 1,000 cubic feet per second to 2,000 cubic feet per second with the resulting 6-inch increase in navigable depths over the shoals in the river between those two places.

(8) The two proposed reservoirs will be easily accessible by a state highway and will offer substantial recreational opportunities to people from local and distant areas.

(9) The future peak loads for the systems of the cities of Tacoma and Seattle will probably increase annually by at least 40,000 kilowatts and the energy requirements will probably increase annually by at least 200 million kilowatt-hours. These probable annual increases in peak load and energy requirements do not include additional load and energy to be required as the result of defense activities.

(10) The dependable capacity of the hydroelectric power plants of the Tacoma and Seattle systems, including the addition of new hydroelectric capacity presently planned or being installed, but exclusive of the Cowlitz project, is 700,000 kilowatts when used to serve a combined power load of 1,165,000 kilowatts. The dependable capacity is somewhat less when used to serve combined loads of smaller magnitude. This 700,000 kilowatts of dependable hydroelectric capacity will not be sufficient to serve estimated system load of Tacoma and Seattle beyond 1953.

(11) The Northwest Region has been deficient in dependable capacity to supply the area loads for 1946 to 1949 and during those years the amount of load actually carried was in excess of dependable capacity because the river flows were in excess of those experienced during the period of the most adverse stream flow. In addition, some loads were carried on an interruptible basis.

(12) During the winters of 1947-1948 and 1948-1949 a shortage of power supply occurred in the Northwest Region, resulting in curtailment of load. Only because exceptionally good water conditions existed

during the winter of 1949-1950 was it possible to escape serious curtailment of loads during that period.

(13) There have been restrictions on the additions of new loads on the electric systems of the Northwest Region prior to the advent of the national emergency and the power shortage is even more serious at the present time in spite of the speed-up efforts being made by the agencies of the Federal Government and others to provide additional power supply as quickly as possible.

(14) The actual loads in the Northwest Region have been exceeding estimated loads for the present water year 1950-51.

(15) The existing power shortage in the Northwest Region is more acute in the area on the west side of the Cascade Mountains, including the Puget Sound area, than it is on the eastern slopes of the Cascades.

(16) In recent years the Federal Government has provided the major portion of new power supply provided in the Northwest Region. The various Federal schedules known as "Advance Programs" show that the estimated time when new generating units would be placed in operation in the Columbia River basin have not been met.

(17) Because of the time lag which has developed between growth or requirement for power and construction of power supply facilities, there will not be firm power available to supply full potential loads until after 1958 and interim power supply for some new industrial loads will necessarily be sold on an interruptible basis.

(18) At the present time, during the national emergency, steps are being taken to provide as much new power supply as possible to meet the new defense electric loads. A tentative so-called "speed up program" of construction of new power supply has been prepared by the Bonneville Power Administration and others for the primary purpose of obtaining additional power supply for defense loads. This program is in final form and further authorization and funds must

be obtained from Congress before the program can be completed.

(19) If a critical water year should occur in the winter season of 1950-51 there would be a 425,000-kilowatt average power shortage in the Northwest Region of which only 125,000-kilowatts would be interruptible load.

(20) Based on estimated future loads for the Northwest Region and the estimated power supply that is to be provided to supply such loads, there will be a deficiency of dependable capacity in the Northwest Region until about 1960, at which time there should be just about sufficient capacity for load and for adequate reserves. Without the addition of new defense loads, the deficiency in dependable capacity in 1955 will be about 430,000-kilowatts, and there could be a deficiency in plant capability of as much as 870,000-kilowatts. Should an adverse water year be experienced prior to the year 1954, it would be necessary to curtail seriously the general service load of the Northwest Region.

(21) As the Northwest Region will continue to be deficient in power supply for approximately the next ten years, only such new loads can be taken on as can be supplied by development of new power sources.

(22) There will be a power market available for the type of power that could be produced by the Cowlitz Project as soon as that output would be made available and there will also be a market for all other new sources of power that might be developed under existing plans. Because of its size, location and characteristics of power output, the Cowlitz Project will be an exceptionally valuable addition to the Northwest Region power supply and, will relieve to some extent the power shortage which may continue for almost a decade.

(23) Annual peak power demand in the Northwest Region occurs during the period when the flow of water in the main stem of the Columbia River is low. As the flow of the Cowlitz is high at the time the flow of the Columbia is low, the Cowlitz Project output could fit

into and be of material advantage to the coordinated operation and permit utilization of this diversity in stream flow to supply a large block of power at the time of regional system peak loads. The addition of 345,000-kilowatts of installed capacity which could be provided initially by the Cowlitz Project, if made within three years, would assist greatly in alleviating the power shortage in the Northwest Region and because the project would be located in western Washington, a displacement of power flows from the eastern portion of the Bonneville system into the Tacoma-Seattle-Portland area would result in a reduction in transmission line losses. Further, the Cowlitz River Project will improve the flexibility of the Northwest Power Pool by making available more synchronizing power west of the Cascade Mountains.

(24) By adding from 270,000 kilowatts to 345,000 kilowatts of new capacity, the Cowlitz Project will reduce substantially the amount of "load-shedding" in the Tacoma-Seattle area that now occurs when operating troubles develop on the system of the Northwest Power Pool.

(25) During the flood periods on the Columbia River the Cowlitz Project could offer substantial power assistance to the Portland area.

(26) On the basis of the evidence in this record, none of the hydroelectric projects suggested for construction in lieu of the Cowlitz Project can be constructed as quickly or as economically as the Cowlitz Project.

(27) The Applicant has a preference, under the law, over private utilities in the purchase of power from Bonneville Power Administration.

(28) The only new sources of power supply in substantial quantities that could be constructed by the Applicant and placed on the line by 1954 consist of the proposed Cowlitz Project and new steam electric plants.

(29) The cost of the proposed project will be about $135 million exclusive of any required fish handling facilities.

(30) The estimated cost of the fish handling facilities presently proposed by the Applicant for construction as a part of the proposed project is $7,100,000.

(31) The annual value of Cowlitz power will exceed the annual cost of producing that power by at least $1,700,000 based on an interest rate of 2 percent.

(32) Although no monetary value has been assigned to the flood control or navigation benefits which could be provided by the project, the former benefits will be substantial and the navigation benefits will be direct and of increasing usefulness.

(33) For an average cost of money of 2.5% for 42 years or 2.75% for 38 years, the ratio of gross earnings to debt service requirements would be 1.5 under the existing rate schedules of the Applicant with a minimum realization of 6 mills per kilowatt-hour, and a debt of $135 million could be financed by the City of Tacoma system at a satisfactory average money cost. If the Cowlitz Project cost were $142 million rather than $135 million, the debt could also be retired in reasonable time.

(34) The project as proposed by the Applicant will utilize to the maximum feasible extent all of the fall and the full flow of the Cowlitz River throughout the reach of the river to be developed and the available water resources in the reach of the Cowlitz River involved for power, navigation and flood control purposes.

(35) The project, if constructed according to the plans submitted by the Applicant, will be safe and adequate to develop the available water resources at the two sites for power purposes and the plans for the power features of the project conform with accepted engineering practices.

(36) Proposals by the U. S. Fish and Wildlife Service for the improvement of spawning conditions and an increase of the salmon runs into tributaries to the lower Columbia River have been expanded and formalized by the Fish and Wildlife Service in the Lower Columbia River Fishery Plan. The purpose of the plan is to conserve, rehabilitate and enhance the fishery resources of the Columbia Basin, and the

plan was devised to offset effects caused by constructed and proposed dams in the Columbia River Basin.

(37) The Lower Columbia River Fishery Plan was conceived around 1945. In 1946 Congress provided legislation which enabled the States to be brought directly into the program, and on June 23, 1948, the Fish and Game Commissions of the States of Washington, Oregon, and Idaho entered into an agreement with the Fish and Wildlife Service outlining the areas of authority of the States and the services and duties of each under this fisheries program. The program generally is to be performed by the States under the agreement, with funds appropriated by Congress in the annual appropriation made to the Army Engineers to carry out its civil functions, and these funds are then transferred by the Army to the Fish and Wildlife Service.

(38) While Congress has not specifically approved or adopted the $20,000,000 Lower Columbia River Fishery Plan, it specifically authorized and appropriated funds in the fiscal years of 1949, 1950 and 1951 to be used for specific facilities included in the Plan.

(39) Both the U. S. Bureau of Reclamation and the Army Engineers have subscribed to the objectives of the Lower Columbia River Fishery Program and to its completion by the Fish and Wildlife Service as rapidly as funds will permit. The Army Engineers in the comprehensive basin plan included in the "Review Report on Columbia River and Tributaries" have given full approval to this program, and have recommended that development of the basin be so scheduled as to permit the full implementation of the program. The Board of Engineers for Rivers and Harbors have recommended that the fishery program be advanced, and the Chief of Engineers in his letter transmitting the Review Report to the Secretary of the Army for submission to the Congress recommended that Congress give favorable consideration to the Lower Columbia River Fisheries Plan.

(40) While there are several problems which require both engineering and biological study in connection with

the fish ladder system proposed for passing upstream migrants over the proposed dams before adoption of a final design, the present data in the record is promising enough in prospect as to not support a rejection of such a ladder system at this time. The alternative method of trapping and hauling upstream migrants past the dams should produce reasonably satisfactory results.

(41) While the record does not show conclusively whether certain features of the facilities proposed for passing downstream migrants would be adequate to prevent excessive losses, the record does indicate that with proper testing and experimentation it should be possible to provide fish handling facilities of the type proposed which will prevent undue losses of downstream migrants. Further tests and experimentation should be made before any permanent features of the fish handling facilities for downstream migrants are constructed.

(42) While the Applicant has proposed conservation practices, facilities and improvements for conservation of the fishery resources of the Cowlitz River watershed in addition to the facilities proposed for installation at or in the dams, such proposals and the effect thereof are not sufficiently detailed in the record to permit an adequate appraisal of their effectiveness. However, they show enough promise to justify the carrying through of more detailed studies and plans.

(43) On the Cowlitz River watershed the total annual gross value due to all fish, regardless of species, attributable to the area above Mayfield, is roughly equal to that below Mayfield, in each case being about one million dollars.

(44) The annual net dollar value due to the fish attributable to the area above Mayfield is about equal to that below Mayfield, and in each case that value may be considered roughly as being approximately $600,000. The annual net value due to fish, exclusive of recreational values derived from the sportsmen's catch, is estimated to be about $515,000 above Mayfield and about $445,000 below Mayfield.

(45) The annual net recreational dollar value of the sportsmen's catch of anadromous fish attributable to the Cowlitz River system above Mayfield is estimated to be about $76,000 which is one-half the estimated gross recreational fish value. The annual net recreational dollar value which would be provided by the Mayfield and Mossyrock reservoirs would offset, to an extent which cannot be now determined, the loss of recreational value occasioned by the construction of the project.

(46) The annual net recreational value of the sportsmen's catch of anadromous fish attributable to the Cowlitz River basin below Mayfield is estimated to be about $136,000.

(47) The investment cost of facilities and improvements for the Applicant's fishery resources program, if permitted to proceed under license, would be at least $9,465,000. Using this estimated cost, which has been derived by the Staff, the annual cost of operating and maintaining facilities and improvements plus the fixed charges on the investment may be estimated at $610,000.

(48) The record does not show that construction, maintenance and reasonable operation of the Cowlitz Project would have any substantial adverse effect on the fishery resource below the Mayfield site, and there are indications that conditions downstream will be improved somewhat when the project is constructed.

(49) If it is assumed that there would be no measurable loss of the fishery resources of the Cowlitz River system resulting from the construction, operation and maintenance of the proposed project, the annual net benefits of the proposed project, exclusive of navigation and flood control benefits, would be $1,090,000 ($1,700,000 power value less $610,000 fish facilities operating cost).

(50) If it is assumed that one-half of the fishery resources above Mayfield is saved after construction of the proposed project, the annual net benefits of the project, exclusive of navigation and flood control benefits,

would be $790,000 ($1,700,000 power value less $610,000 fish facilities operating cost less $300,000 fish loss).

(51) Even if no fish were saved above Mayfield after construction of the proposed project, the annual net benefits of the project exclusive of navigation and flood control would be $499,033 ($1,700,000 power value less $610,000 fish facilities operating cost less $590,967 fish loss).

(52) Based on cost data in the record and on estimates made to approximate other costs, the Cowlitz Project would be financially and economically feasible if constructed in accordance with the plans as presently submitted.

(53) The Applicant is a municipal corporation; it has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project; and it is a municipality within the meaning of Section 3 (7) of the Act.

(54) The Applicant has submitted satisfactory evidence of its ability to finance and carry to completion the project described in the application, with such modifications as may be found to be appropriate.

(55) No conflicting application is before the Commission. Due public notice has been given.

(56) The proposed project will not affect any Government dam, nor will the issuance of a license therefor as hereinafter provided affect the development of any water resources for public purposes which should be undertaken by the United States.

(57) The issuance of a license for the project will not interfere or be inconsistent with the purposes for which any reservation or withdrawal of public lands was created or acquired.

(58) The ultimate installed horsepower capacity of the project hereinafter authorized is 474,000 horsepower, and the energy generated thereby will be sold or used by the Licensee.

(59) Under present circumstances and conditions and upon the terms and conditions hereinafter included in the license, the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes.

(60) The amount of annual charges to be paid under the license for the purpose of reimbursing the United States for the costs of administration of Part I of the Act is reasonable as hereinafter fixed and specified, and the amount of annual charges to be paid under the license for the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands, including transmission line right-of-way, should be later determined.

(61) In accordance with Section 10 (d) of the Act the rate of return upon the net investment in the project and the proportion of surplus earnings to be paid into and held in amortization reserves are reasonable as hereinafter specified.

(62) The exhibits described and designated below, filed as part of the application for license as supplemented, conform to the Commission's rules and regulations and should be approved as part of the license for the project.

(63) The proposed project will consist of two developments, namely, Mossyrock and Mayfield, as follows:

(a) The Mossyrock development will be located on the Cowlitz River at about mile 65 and will consist of a concrete gravity dam or other suitable type of dam as may be determined by further investigation and design. The dam will be about 510 feet maximum height above bedrock and about 1300 feet in length at its crest and contain an ogee type spillway surmounted by 5 taintor gates.

The reservoir will extend approximately 21 miles upstream and have an area of about 10,000 acres with normal water surface at elevation 750 feet, a gross storage capacity of about 1,372,000 acre-feet, and a usable storage capacity of about 824,000 acre-feet with a 100-foot draw-down; a powerhouse built integral with the toe of the non-overflow section of the dam as a foundation, with initial installation comprising three 75,000-kilowatt units, making a total capacity of 309,000 horsepower or 225,000 kilowatts operating under a gross head which would vary from 325 to 225 feet. Provision is to be made for a fourth additional unit of 75,000 kilowatts. A step-up substation will be installed adjacent to the powerhouse. The Mossyrock development will provide flood-control storage as desired by the Chief of Engineers, Department of the Army.

(b) The Mayfield development will be located on the Cowlitz River at about mile 52 and will consist of a concrete dam composed of a small arch section across the narrow river gorge, an ogee gravity spillway section surmounted by 5 taintor gates, and 2 gravity abutment sections, the dam to have a maximum height of about 240 feet above bedrock and a length of about 850 feet at its crest; a reservoir extending approximately 13.5 miles upstream to the Mossyrock dam with an area of about 2,200 acres with normal water surface at elevation 425 feet, a gross storage capacity of about 127,000 acre-feet and a usable storage capacity of about 21,000 acre-feet with a 10-foot draw-down; a tunnel about 880 feet long, with associated concrete head works, fish screens, forebay, gate house, and steel penstocks leading to the Mayfield powerhouse; a powerhouse with initial installation comprising three 40,000-kilowatt units making a total capacity of 120,000 kilowatts, or 165,000 horsepower, operating under a gross head which would vary from 185 to 175 feet. Provision is to be made for a fourth unit of 40,000 kilowatts. A step-up substation will be installed adjacent to the power-

house. Double circuit 230-kilovolt transmission lines on steel towers will connect the two powerhouses and extend to the Cowlitz substation on the outskirts of Tacoma. These lines will have an aggregate length of about 60 miles.

(c) Such fish ladders, fish traps or other fish handling facilities or fish protective devices as may be hereafter approved by thhe Commission upon the recommendation of the Secretary of the Interior.

(d) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by applicant or by the United States; such project area and project boundary being more specifically shown and described by certain exhibits which formed part of the application for license and which are designated and described as follows:

Exhibit J: Drawings in two sheets, Sheet 1 signed by C. A. Erdahl, Acting Mayor and Commissioner of Public Utilities, December 24, 1948, and Sheet 4 signed by C. V. Fawcett, Mayor, and approved by C. A. Erdahl, Commissioner of Public Utilities, June 15, 1949 and comprising:

Sheet 1 (FPC No. 2016-1) entitled "Location Map"; Sheet 2 (FPC No. 2016-4) entitled "General Project Map."

(e) The principal structures referred to above, the location, nature and character of which are more specifically shown by the exhibits hereinbefore cited and by certain other exhibits which also formed part of the application for license and which are designated and described as follows:

Exhibit L: Drawings in 13 sheets, signed by C. V. Fawcett, Mayor, and approved by C. A. Erdahl, Commissioner of Public Utilities, Sheet

1 on December 24, 1948 and the other sheets on June 15, 1949, and comprising:
Sheet 1 (FPC No. 2016-2) entitled "Mayfield Dam, General Plan";
Sheet 3 (FPC No. 2016-5) entitled "Mayfield Dam, Arch and Thrust Blocks, Plan and Sections";
Sheet 4 (FPC No. 2016-6) entitled "Mayfield Dam, Cross Sections Thru Spillway";
Sheet 5 (FPC No. 2016-7) entitled "Mayfield Powerhouse, Plans and Sections";
Sheet 6 (FPC No. 2016-8) entitled "Mayfield Powerhouse and Intake, Typical Section";
Sheet 7 (FPC No. 2016-9) entitled "Mayfield, One Line Diagram";
Sheet 8 (FPC No. 2016-10) entitled "Mayfield Switchyard, General Plan";
Sheet 11 (FPC No. 2016-13) entitled "Mossyrock Powerhouse, Plans and Sections";
Sheet 12 (FPC No. 2016-14) entitled "Mossyrock Powerhouse, Typical Cross Section and Elevation";
Sheet 13 (FPC No. 2016-15) entitled "Mossyrock One Line Diagram";
Sheet 14 (FPC No. 2016-16) entitled "Mossyrock Switchyard, General Plan";
Sheet 9 (FPC No. 2016-17) entitled "Mossyrock Dam, Plan and Section"; and
Sheet 3 (FPC No. 2016-18) entitled "Mossyrock Dam, Spillway Section."

Exhibit M: A statement in four sheets entitled "General Description and General Specifications of Proposed Mechanical, Electrical and Transmission Equipment for the Project" and filed June 20, 1949.

(f) All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as a part of the project

is approved or acquiesced in by the Commission; also all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance and operation of the project.

(65) The Secretary of the Army and the Chief of Engineers have approved the project plans insofar as they affect the interests of navigation and flood control, upon the license conditions hereinafter provided for the protection of such interests.

(66) The Secretary of the Interior reported that he was hopeful that with proper effort and study the fish problem could be solved and recommended stipulations for the protection of fishlife. The substance of his recommendations has been included, with the exception of a requirement limiting the fish protective devices to those approved by State agencies, a limitation which does not appear appropriate in a Federal license.

The Commission *orders:*

(A) This license is issued to the City of Tacoma, Washington, under Section 4 (e) of the Act for a period of 50 years, effective as of the first day of the month in which the accepted license is filed with the Commission by the Licensee, for the construction, operation and maintenance of Project No. 2016 upon the Cowlitz River, a stream over which Congress has jurisdiction, and upon lands of the United States, subject to the terms and conditions of the Act which is incorporated by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) This license is also subject to the terms and conditions set forth in Form L-6 entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States", which terms and conditions are attached hereto and made a part hereof; and subject to the following special conditions set forth herein as additional articles:

Article 28. The Licensee shall commence construction of project within two years of the effective date of this license; shall thereafter in good faith and with due diligence prosecute such construction; and shall complete the project works in 36 months.

Article 29. The Licensee shall prior to flooding clear all lands in the bottoms and margin of the reservoir up to high water level, and shall dispose of all temporary structures, unused timber, brush, refuse, or inflammable material resulting from the clearing of the lands or from the construction and maintenance of the project works. In addition, all trees along the margin of the reservoir which may die during the operation of the project shall be removed. The clearing of the lands and the disposal of the material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission.

Article 30. Before beginning the construction of any permanent fish ladders, fish traps or other fish handling facilities or fish protective devices, the Licensee shall make further studies, tests and experiments to determine the probable effectiveness of such facilities and devices and shall submit plans therefor and obtain Commission approval. In making such studies, tests and experiments and in the preparation of final design plans, the Licensee shall cooperate with the United States Fish and Wildlife Service and the Departments of Fisheries and Game of the State of Washington. The Licensee shall continue its studies and investigations with respect to its proposed program of stream improvement and hatchery facilities. The Licensee shall submit quarterly reports to the Commission of its activities hereunder.

Article 31. The Licensee shall construct, maintain and operate such fish ladders, fish traps or other fish handling facilities or fish protective devices and make such stream improvements and provide such fish hatcheries and similar facilities

and comply with such reasonable modifications of the project structures and operation in the interest of fish as may be prescribed hereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior.

Article 32. The Licensee shall pay the United States the following annual charges for the purpose of reimbursing it for the costs of administration of Part I of the Act: One (1) cent per horsepower on the authorized installed capacity (474,000 horsepower), plus two and one-half (2½) cents per 1,000 kilowatt-hours of gross energy generated by the project during the calendar year for which the charge is made. The Licensee shall also pay to the United States such charges as may be specified hereafter for the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands, including transmission line right-of-way.

Article 33. The Licensee shall, within two years of the effective date of this license, file Exhibits F and K in accordance with the rules and regulations of the Commission.

Article 34. During the months of October through May flood storage space reservation in Mossyrock Reservoir corresponding to reservoir level elevation 750, full reservoir, on 1 October, decreasing uniformly to elevation 723 on 1 December, remaining constant at elevation 723 from 1 December to 1 February, increasing uniformly from elevation 723 on 1 February to elevation 745 on 1 May and reaching elevation 750 no sooner than 1 June, shall be kept available for the temporary storage of flood water. During floods the gates shall be operated, in conjunction with the operation of the Mayfield Reservoir, so as not to exceed a flow of 70,000 cfs (bank full capacity) at Castle Rock, Washington, until the reservoir storage, if exceeding the specified reservation, has been decreased to the specified reservation.

Article 35. In the interest of navigation:

(a) The minimum release of water at the Mayfield plant shall be 2,000 cubic feet per second; and

(b) The rates of change of release of water from the Mayfield plant shall not exceed that which will cause a change of water level at the City of Castle Rock, Washington, of one foot per hour, either up or down.

(C) The exhibits specified in paragraph (63) above are approved as part of this license.

(D) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed within the 30-day period provided by Section 313 (a) of the Act.

(E) This license shall be accepted and returned to the Commission within 60 days from date of issuance of this order.

By the Commission.

LEON M. FUQUAY,
Secretary.

Date of Issuance: November 28, 1951

APPENDIX D

STATE OF WASHINGTON DEPARTMENT OF GAME ET AL.

v.

FEDERAL POWER COMMISSION.

No. 13289.

United States Court of Appeals, Ninth Circuit.

Oct. 5, 1953.

Proceedings on petition for review of orders of Federal Power Commission granting municipality a license to construct, operate and maintain two dams with appurtenant power facilities on a navigable state river. The Court of Appeals, Stephens, J., held that evidence sustained finding that dams were necessary to alleviate power shortage in Northwest, and that the project was best adapted to comprehensive plan for improving or developing waterway for use or benefit of interstate or foreign commerce, for improvement and utilization of water power development, and for other beneficial uses, including recreational purposes.

Orders affirmed.

* * * * * * * * * * *

Don Eastvold, Atty. Gen., William E. Hicks, Harold A. Pebbles and Lee Olwell, Sp. Assts. Atty. Gen., Olympia, Wash., for petitioners, State of Washington.

Stephen J. Morrissey, Seattle, Wash., for petitioner, Washington State Sportsmen's Council, Inc. Clarence M. Boyle, Corp. Counsel, Dean Barline, Asst. Corp. Counsel, E. K. Murray, Sp. Counsel, City of Tacoma, Washington, for intervener, City of Tacoma, Wash.

Bradford Ross, Gen. Counsel, Willard W. Gatchell and Howard E. Wahrenbrock, Assts. Gen. Counsel, John C. Mason, Atty., Federal Power Commission, Washington, D. C., for respondent.

Before STEPHENS, HEALY and ORR, Circuit Judges.

STEPHENS, Circuit Judge.

Since 1893, the City of Tacoma, a municipal corporation in the State of Washington, has produced, transmitted, distributed and sold for use electric energy generated in its own steam electric and hydroelectric plants. On December 28, 1948, the City filed with the Federal Power Commission an application for a license[1] to construct, operate, and maintain two dams (one designated as the Mossyrock, the other as the Mayfield) with appurtenant power facilities on a State of Washington river known as the Cowlitz. The Cowlitz River flows southerly into the Columbia River seaward of Portland, Oregon.

The Mossyrock Development is proposed to be located sixty-five miles upstream from the Cowlitz mouth and is to comprise a dam rising five hundred feet above bedrock which will intercept the river runoff and store the accumulated water in a natural reservoir twenty-one miles in length. The flow will be equated through the dam and through a hydroelectric power plant having an initial power potential of 225,000 kilowatts and an ultimate potential of 75,000 more kilowatts.

The proposed Mayfield Development is to be located thirteen and one-half miles downstream from Mossyrock and is to consist of a dam rising two hundred forty feet above bedrock, a power plant with an initial potential of 120,000 kilowatts with an ultimate potential of an additional 40,000 kilowatts.

The Federal Power Commission took jurisdiction of the application and, in an order issued March 8, 1949, found that the construction and operation of the project would affect lands of the United States, that the Cowlitz River was navigable below the site of the proposed dams and that

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[1] Section 4(e) of the Federal Power Act, Title 16 U.S.C.A. § 797(e).

their construction would affect the interests of interstate and foreign commerce. Accordingly, it concluded that Tacoma could not legally build the dams without a Federal Power Commission license.[2]

Thereupon the Commission ordered a public hearing to determine whether the license should issue. The "State of Washington Departments of Game", of "Fisheries" and the "Washington State Sportsmen's Council, Inc.," (a private corporation), all hereinafter to be called "Petitioners", were permitted to intervene in opposition to the City's application. The Attorney General for the State appointed a special assistant attorney general to represent all persons not otherwise represented whose views were in conflict with the State Departments of Game and Fisheries. Thus, the State of Washington by its Attorney General, and the people of Washington holding views not in harmony with the State's official position, and the applicant City of Tacoma were represented at the hearing which was had before an Examiner.

Having heard the evidence offered by the interested parties, the Presiding Examiner issued his "Recommended Decision" in which he made findings of fact with his conclusion that the application for license should be denied because the proposed construction would conflict with the comprehensive plan[3] for developing the Columbia River

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[2] Section 23(b), Federal Power Act, Title 16 U.S.C.A. § 817.

[3] The Fish and Wildlife Service of the Department of the Interior has formulated what is known as the Lower Columbia River Fishery Plan. This plan, which includes within its scope the Cowlitz River, contemplates the improvement of the fish runs on the Columbia River through the cooperative efforts of Oregon, Washington, and the United States Fish and Wildlife Service in the removal of obstructions to the passage of fish, the abatement of pollution, the screening of diversions, and the use of hatcheries and fish refuges.

"The Review Report on the Columbia River and Tributaries," prepared by the Army Corps of Engineers, included with approval the Lower Columbia River Fishery Plan.

Basin and for that reason would not be best adapted "for other beneficial public uses, including recreational purposes",[4] because "it has not been shown that the development of the Cowlitz River for power at this time is such an economic necessity as to warrant the undertaking proposed, so long as that construction may be deemed probably injurious to the protection and maintenance of the valuable runs of anadromous fish [fish which return to their spawning grounds for spawning] now utilizing the river."[5]

The City of Tacoma, the Special Assistant to the State Attorney General (opposing the position of the State Attorney General), and the Commission Staff Counsel filed exceptions to the Recommended Decision. The Commission ordered oral argument[6] and subsequently filed an opinion and order granting the license. We summarize the pertinent findings and conclusions of the Commission as follows:

1. The Commission reasserts its jurisdiction and describes the physical characteristics of the project.

2. The project will increase the navigability of the Cowlitz River by increasing the average minimum flow below the dams.

3. The reservoirs are easily accessible by state highway for recreational opportunities.

4. An annual increase of 40,000 kilowatts in peak load electric energy requirements in the Tacoma-Seattle area is anticipated. This estimate does not include defense activities.

5. There is a power shortage in the Northwest, especially in the Puget Sound area.

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[4] Section 10, Federal Power Act, Title 16 U.S.C.A. § 803(a).

[5] Record on Appeal, pp. 170-1.

[6] Title 18 C.F.R. § 1.31.

6. A ten-year power shortage is anticipated. Thus, new power sources must be developed to supply new loads.

7. There is no evidence that any other hydroelectric project in lieu of the Cowlitz Project could be constructed as quickly or as economically.

8. The cost is estimated at $135 million exclusive of fish handling facilities.

9. The cost of fish handling facilities is estimated at $7,100,000.

10. The annual value of Cowlitz power will exceed the cost of production by at least $1,700,000, based on a 2% interest rate.

11. There will be substantial flood control and navigation benefits.

12. The debt incurred in building the project can be retired in a reasonable time.

13. The Lower Columbia River Fishery Plan[7] conceived around 1945 by the Fish and Wildlife Service of the Department of the Interior and approved by the United States Bureau of Reclamation and by the Army Engineers, contemplates individual state action with the aid of Congressional appropriations.

14. The ladder system of passing fish upstream should not be rejected although engineering and biological studies must still be made.

15. Hauling and trapping should be a satisfactory alternate for getting fish upstream.

16. Testing and experimentation should make it possible to develop means of successfully passing fish downstream.

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[7] See footnote 3, supra.

17. The value of the fish spawning above the dams equals the value of the fish spawning below the dams.

18. The fish below the dams will not be injured by the dams.

19. The project is economically and financially feasible.

20. Tacoma is a municipality within the meaning of Section 3(7)[8] of the Act and has submitted satisfactory evidence of compliance with the requirements of all applicable state laws "insofar as necessary to effect the purposes of a license for the project."[9] Finding No. 53, Transcript of Record on Appeal, page 551.

21. Tacoma has submitted satisfactory evidence of financial ability to complete the project.

22. There is no conflicting application.

23. Due notice has been given to all interested parties.

24. "Under present circumstances and conditions and upon the terms and conditions hereinafter included in the license, the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes."[10] Finding No. 59, Transcript of Record on Appeal, page 552.

Petitioners sought a rehearing, but it was denied. Thereupon, they sought review in this court.[11]

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[8] Title 16 U.S.C.A. § 796(7).

[9] Cf. Section 9(b), Federal Power Act, Title 16 U.S.C.A. § 802(b).

[10] Cf. Section 4(e), F.P.A., Title 16 U.S.C.A. § 797(e), second proviso, and Section 10(a), F.P.A., 16 U.S.C.A. § 803(a).

[11] Section 313, F.P.A., 16 U.S.C.A. § 825*l*,(a), limits rehearings to "any person, State, municipality or State commission aggrieved

It is provided in the Federal Power Act that:

"§ 9. Each applicant for a license under this chapter shall submit to the Commission—

* * * * * * * * * *

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State * * * within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter. * * *"

Those opposing the application challenge the authority of the Commission to issue a license upon the ground that the quoted section has not been complied with, in that:

1. Tacoma has not obtained from the State Supervisor of Hydraulics a permit for the diversion of water as required by Ch. 112, § 46, State of Washington Laws of 1949.

2. Tacoma has not obtained the written approval of the State Directors of Fisheries and of Game as to plans and specifications for the proper protection of fish life in connection with the construction of the dams as required by Ch. 112, § 49, State of Washington Laws of 1949.

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by an order issued by the Commission". And it confines review by this court to those who have applied for rehearing. Thus, as Tacoma contends in its brief, petitioners are not properly before this court unless they fit one of the categories listed in § 825*l* (a), as defined by § 796, Title 16 U.S.C.A.

Initially we note that this court has jurisdiction because the Washington State Sportsmen's Council, Inc., one of the petitioners, is a person within the definition of § 796(4), since it is a corporation. The State of Washington Department of Game and the State of Washington Department of Fisheries are proper parties since they represent certain interests of the State of Washington in this controversy. All are "parties aggrieved" since they claim that the Cowlitz Project will destroy fish in which they, among others, are interested in protecting.

3. Both of the proposed dams exceed the 25-foot height limit which the Washington legislature put upon the construction of dams on the Cowlitz River or on any stream of the State tributary to the Columbia River downstream from the McNary Dam and within the migratory range of anadromous fish. The Columbia River Sanctuary Act, Ch. 9, § 1, State of Washington Laws of 1949.

The rationale of the objectors' contentions has already been considered and rejected by the Supreme Court in First Iowa Hydro-Elec Co-op. v. Power Commission, 1946, 328 U.S. 152, 66 S. Ct. 906, 90 L. Ed. 1143. In that case the United States Supreme Court analyzed § 9(b) in the light of an Iowa statute which prohibited the building or maintaining of a dam on any navigable stream of the State of Iowa without a permit from the Executive Council of the State. In order to obtain a State permit, an applicant was required to comply with State regulation of the project. The Supreme Court held that the Iowa licensing provisions were in direct conflict with the Federal Power Act, and that if a State license were a "condition precedent to securing a federal license for the same project under the Federal Power Act * * * the Executive Council of Iowa [would possess] a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act." 328 U.S. at page 164, 66 S. Ct. at page 911. Indeed, if § 9(b) were construed to require compliance with state laws in every instance, it would make every application to the Federal Power Commission subject to state control in direct contradiction to the Congressional mandate that the project be subject to "the judgment of the Commission".[12] Therefore, the Supreme Court concluded, § 9(b) does not in itself require compliance with state law; it only empowers the Commission to require such evidence of compliance with state law as, in the Commission's judgment, would be "appropriate to effect the pur-

[12] Title 16 U.S.C.A. § 803(a), § 10(a), Federal Power Act.

poses of a federal license on the navigable waters of the United States." First Iowa Hydro-Elec. Co-op. v. Power Commission, supra, 328 U.S. at page 167, 66 S. Ct. at page 913.

The Commission in our case acted within the scope of its discretion in not requiring Tacoma to show compliance with the laws of the State of Washington regulating the construction of dams in Washington, because compliance with those laws would have prevented the development of the Cowlitz Project; and in the opinion of the Commission of the Cowlitz Project was "best adapted to a comprehensive plan" for the development of a concededly navigable stream. The Federal Government's Constitutional authority to regulate commerce and navigation includes the "power to control the erection of structures in navigable waters", United States v. Appalachian Power Co., 1940, 311 U.S. 377, 405, 61 S. Ct. 291, 298, 85 L. Ed. 243. The Federal Government's power over navigable waters is superior to that of the state. McCready v. Virginia, 1876, 94 U.S. 391, 24 L. Ed. 248.

The objectors further contend that Tacoma, as a creature of the State of Washington, cannot act in opposition to the policy of the State or in derogation of its laws.[13]

Again, we turn to the First Iowa case, supra. There, too, the applicant[14] for a federal license was a creature of the state and the chief opposition came from the state itself. Yet, the Supreme Court permitted the applicant to act inconsistently with the declared policy of its creator, and to prevail in obtaining a license.[15]

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[13] See Williams v. Mayor of Baltimore, 1933, 289 U.S. 36, 53 S.Ct. 431, 77 L. Ed. 1015.

[14] First Iowa Hydro-Electric Cooperative, a cooperative association organized under the laws of Iowa.

[15] First Iowa Hydro-Elec. Co-op. v. Power Commission, 1946, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143; State of Iowa v. Federal Power Commission, 8 Cir., 1949, 178 F.2d 421, certiorari denied 339 U.S. 979, 70 S.Ct. 1024, 94 L.Ed. 1383.

Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States. However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them.[15a]

We turn now to a consideration of the petitioners' attack upon the findings of the Commission. We will, of course, set aside an order of the Commission if we find that it is not based upon findings of fact which are supported by substantial evidence.[16] But to the extent that the findings of the Commission are "supported by substantial evidence, [they are] conclusive".[17] In reviewing an order of the Commission, "this Court may not retry the controversy, substitute its judgment for that of the Commission as to any doubtful or debatable questions of fact, or reverse the challenged orders because the Commission has rejected the views of the State * * * as to what inferences should be drawn from the evidence. The Commission 'is the agency which weighs the relevance of factual data.' See National Labor Relations Board v. Stowe Spinning Co., 336 U.S. 226, 231, 69 S. Ct. 541, 545, [93 L. Ed. 638]." State of Iowa v. Federal Power Commission, 8

[15a] See City of Tacoma v. Taxpayers, et al., No. 32,411, which is now pending before the Supreme Court of the State of Washington.

[16] Pacific Power & Light Co. v. Federal Power Commission, 9 Cir., 1938, 98 F.2d 835, affirmed 307 U.S. 156, 59 S.Ct. 766, 83 L.Ed. 1180.

[17] Section 313(b), Federal Power Act, Title 16 U.S.C.A. § 825l (b).

Cir., 1949, 178 F. 2d 421, 427, certiorari denied 339 U.S. 979, 70 S. Ct. 1024, 94 L. Ed. 1383.

Petitioners concentrate their attack upon what we shall classify as two groups of findings:

1. The necessity of the dams to alleviate a power shortage in the Northwest.

2. The effect of the dams upon the fish runs in the Cowlitz River.

First, as for the necessity of the dams: It is common knowledge that there was a power shortage in the Northwest in the winters of 1947-1948 and 1948-1949, and that the further expansion of other power facilities in the Northwest which Petitioners stress must be weighed against the continued growth of industrial activity in the area, and that in years of low rainfall the capacity of all hydroelectric plants is curtailed. And national defense is a prime element for the Commission's consideration. In short, an estimated necessity for electric energy, quantitatively speaking, must not be determined alone upon present demand projected into the future in accordance with normal circumstances. Paradoxically, abnormality is the normal of the day we live in.

The Cowlitz Project is but sixty miles from Tacoma, and will permit of a much shorter transmission distance than any of the other existing or proposed hydro-electric developments. And while steam electric plants can be built which would aid in Tacoma's electrical needs, we have no part in the decision which Tacoma has arrived at and which the Commission has agreed with as to the desirability of one source of electric energy over the other.[18]

[18] Because the electric energy plants of the northwestern states produce little or no energy beyond their every-day demands, the major systems have entered into a "power pool" by interconnecting their distributing lines. By this arrangement an unusual demand upon any one plant may be met by the transfer of energy from another plant. The City of Tacoma is an integral member of the "pool".

Nor can we weigh the benefits of flood control, improved navigation of the Cowlitz, and accessibility of recreational areas. There is substantial competent and persuasive evidence on these subjects.

We must now consider the fate of the fish on the Cowlitz River. Herein lies the chief concern of those who object to the construction of the dams. They contend that the project will destroy the runs of spring Chinook salmon, fall Chinook salmon, silver salmon, steelhead trout, cutthroat trout and smelt which use the Cowlitz as spawning grounds. They point out that to pass each of the dams, the fish will have to climb ladders of three hundred twenty-five feet at Mossyrock, and one hundred eighty-five feet at Mayfield, each of which is considerably higher than the Bonneville Dam's ladder of sixty-seven feet, the highest dam over which migratory fish have been successfully passed to date.[19] They further argue that, even if some fish should manage to reach their spawning grounds above the dams, their number would be greatly depleted; and furthermore, the fingerlings, when hatched, would face the further task of avoiding destruction in the hydro electric penstocks in their journey to the sea to mature and, in their time, to return in the mysterious cycle of perpetuating the species.

There is evidence that only one-half of the fish spawn above the dam sites, and elaborate plans are contemplated by the City and required by the Commission's order looking to the safe transmission of the fish to the spawning areas above the dams.

As we see it, it is not within our jurisdiction to prescribe a policy. The Federal Government has the jurisdiction over navigable rivers and it is within the power of the Congress and the Executive to prescribe the policy in relation thereto. If the dams will destroy the fish industry

[19] The McNary Dam, now nearing completion, will require migratory fish to climb about ninety feet by means of ladders.

of the river, we are powerless to prevent it. It is admitted that the fish industry on the river is an important one and every known method should be used to preserve it. If it is the law (and we are not holding one way or another) that the Commission is held to the use of discretion in its requirements as to the preservation of any use to which a navigable stream is currently being put, we hold that the Commission has given the subject of the fishing industry due consideration and has not abused its discretion.

There is ample evidence to sustain the Commission in the exercise of its judgment that the Cowlitz Project is "best adapted to a comprehensive plan[20] for improving or developing a waterway [i.e., the Cowlitz River] * * * for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes".[21] Title 16 U.S.C.A. § 803(a).

We decline to interfere with the Commission's order.

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[20] The Federal Power Commission determined upon adequate evidence that the Lower Columbia River Fishery Plan is not inconsistent with the Federal Power Commission's plan for developing the Cowlitz River, since the license issued by the Commission for the construction of the Cowlitz Project requires the applicant City of Tacoma to provide facilities for the protection of the fish which spawn in the Cowlitz River.

[21] Cf. Finding No. 59 of the Commission, quoted supra as No. 24 of the summarized findings.

STATE OF WASHINGTON DEPARTMENT OF GAME ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION AND CITY OF TACOMA.

No. 514.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

See same case below, 207 F. 2d 391.

Don Eastvold, Attorney General of Washington, and William E. Hicks, Lee Olwell, and Harold A. Peebles, Special Assistant Attorneys General, all of Olympia, Washington, and Stephen J. Morrissey, of Seattle, Washington, for petitioners.

Acting Solicitor General Robert L. Stern, Assistant Attorney General Warren E. Burger, and Melvin Richter, Lester S. Jayson, Willard W. Gatchell, John C. Mason, and Louis C. Kaplan, all of Washington, D. C., for respondent Federal Power Commission.

Clarence M. Boyle, Dean Barline, and E. K. Murray, all of Tacoma, Washington, for respondent City of Tacoma.

April 5, 1954. Denied. Mr. Justice Douglas is of the opinion certiorari should be granted.

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TUESDAY, APRIL 30, 1957

Judgment

No. 33706

Thurston County No. 26572

THE CITY OF TACOMA, a municipal corporation,
Appellant and Cross-respondent,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State,
Respondents and Cross-appellants.

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 30th day of April, A. D. 1957, on motion of John J. O'Connell, Attorney General, and Lynch and Lynch of counsel for respondents and cross-appellants, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said The Taxpayers of Tacoma, Washington, Robert Schoettler, as Director of Fisheries, John A. Biggs, as Director of Game, of the State of Washington, and The State of Washington, a Sovereign State, have and recover of and from the said The City of Tacoma, a municipal corporation, the costs of this action taxed and allowed at Seven hundred twenty-three and 64/100 ($723.64) Dollars, and

that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Of Record in Journal 41 at
page 592
in the Office of the Clerk of
the Supreme Court

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

No. 26572

Judgment

THE CITY OF TACOMA, a municipal corporation,
Plaintiff,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON; and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State,
Defendants.

This matter coming on regularly for trial, without a jury, on the 11th day of January, 1956, on plaintiff's amended complaint, the amended answer and cross-complaint of defendants, State of Washington, Robert Schoettler, director of fisheries, and John A. Biggs, director of game, and the answer and affirmative defense of E. R. McKee, representative taxpayer; plaintiff appearing by E. K. Murray, special counsel, and Frank L. Bannon, chief assistant city attorney; defendants, State of Washington, Robert Schoettler, director of fisheries, and John A. Biggs,

director of game, appearing by Don Eastvold, attorney general, Joseph T. Mijich and E. P. Donnelly, assistant attorneys general; and E. R. McKee, defendant taxpayer, appearing by John S. Lynch; and a pretrial conference stipulation and order having heretofore been entered herein, and certain admissions in the pleadings having heretofore been made, and evidence, both oral and documentary, having been introduced at the trial and the cause submitted for decision, and the court having heretofore entered its findings of fact and conclusions of law; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the question of the capacity of the plaintiff to acquire property of the defendant, State of Washington, by eminent domain is not within the jurisdiction of this court,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the question of damage to fish which might result from construction of plaintiff's Cowlitz Project was passed upon by the Federal Power Commission and the Federal Courts and is not now a proper one for consideration by this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Sections 27 and 36, Chapter 117, Laws of 1917, as amended (R. C. W. 90.20.010 and 90.28.060) are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the provisions of Chapter 9, Laws of 1949, (R. C. W. 75.20.010 et seq), and Sections 46, and 49, Chapter 112, Laws of 1949, as amended (R. C. W. 72.20.050 and 75.20.100), are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said

project, or insofar as they would enable State officials to exercise a veto over said project.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff is acting illegally and in excess of its authority in the construction of the Mayfield and Mossyrock hydroelectric project as presently proposed for the reason that said project would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of R. C. W. 80.40.010 et seq.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the injunction pendente lite, entered October 7, 1955, be continued in effect until July 1, 1956, from and after which later date plaintiff is hereby enjoined from spending any sums of money relating to the Mayfield and Mossyrock hydroelectric project.

Plaintiff excepts to the provisions of the last two paragraphs of this Judgment, the defendant Taxpayers except to the first paragraph of this Judgment and further except to the last paragraph as authorizing any further expenditure of sums of money, and Defendant State of Washington

excepts to the first three paragraphs of this Judgment, and all exceptions are hereby allowed.

DONE IN OPEN COURT this 6th day of March, 1956.

/s/ CHARLES T. WRIGHT
Judge

Presented by:
/s/ JOSEPH T. MIJICH
Assistant Attorney General
Attorney for Defendant Directors and the State of Washington

/s/ LYNCH & LYNCH
Attorneys for Defendant Taxpayer

Copy Received

/s/ E. K. MURRAY
of Attys for Plfl.

Filed Superior Court
Thurston County, Wash.
Mar 6 11 48 AM '56
PAUL PAULK, *Clerk*
By R. H.
Deputy

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 33706

Department

Order

THE CITY OF TACOMA, a municipal corporation,
Appellant,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON; and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State,
Respondents.

The court having considered the appellant's petition for a rehearing herein and its alternative petition for a clarification of the opinion heretofore filed herein, and reported in 149 Wash. Dec. 744, 307 P. (2d) 567, together with the answers thereto filed by the respondents The Taxpayers of Tacoma and The State of Washington, respectively,

NOW, THEREFORE, IT IS ORDERED that the petition for rehearing be and it is hereby denied.

AND IT IS FURTHER ORDERED that the petition for clarification be granted in part; and to achieve such clarification, an addition to the opinion heretofore filed and reported has been filed this day.

AND IT IS FURTHER ORDERED that the addition to the opinion filed this day be made a part of the opinion as published in Volume 49 (2d) of the Washington Reports.

Dated this 30th day of April, 1957.

By the Court:

/s/ MATTHEW W. HILL
Chief Justice

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No.

OCTOBER TERM, 1957

THE CITY OF TACOMA, a municipal corporation,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as DIRECTOR OF FISHERIES, *et al.*

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 27th, 1957.

HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 22nd
day of July. 1957

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FILED
MAR 14 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 509

THE CITY OF TACOMA, A MUNICIPAL CORPORATION,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, AND ROBERT SCHOETTLER, AS DIRECTOR OF FISHERIES, AND JOHN A. BIGGS, AS DIRECTOR OF GAME, OF THE STATE OF WASHINGTON, AND THE STATE OF WASHINGTON, A SOVEREIGN STATE, *Respondents.*

BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 509

THE CITY OF TACOMA, A MUNICIPAL CORPORATION,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, AND ROBERT SCHOETTLER, AS DIRECTOR OF FISHERIES, AND JOHN A. BIGGS, AS DIRECTOR OF GAME, OF THE STATE OF WASHINGTON, AND THE STATE OF WASHINGTON, A SOVEREIGN STATE, *Respondents.*

BRIEF OF PETITIONER

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington (R. 268), together with a dissenting opinion (R. 287), was filed February 7, 1957. An "Addition to Opinion" of the Court (R. 370) was filed

April 30, 1957. The opinion and "addition" are consolidated in the published reports, 49 Wn. 2d 781, 307 P. 2d 567 (1957), and are reprinted as Appendix A to the Petition for Certiorari in the present case.

A prior opinion in the same case is reported in 43 Wn. 2d 468, 262 P. 2d 214 (1953), and appears at R. 65.

The related opinion and order of the Federal Power Commission (Opinion 221 on Project 2016), granting petitioner a license to construct the dams in question, are reported in 92 P.U.R. (n.s.) 79. The opinion appears at R. 18-27 and the order at R. 27-48.

The related opinion of the United States Court of Appeals for the Ninth Circuit, affirming the Federal Power Commission's order, *State of Washington Department of Game, et al.* v. *Federal Power Commission* [*City of Tacoma, Intervener*], is reported at 207 F. 2d 391 (1953), *cert. denied*, 347 U.S. 936 (1954).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C., section 1257(3). The judgment (R. 372) was entered April 30, 1957. Time to file petition for writ of certiorari was extended by this Court to and including September 27, 1957 (R. 382). Petition for writ of certiorari was filed September 27, 1957. Certiorari was granted December 9, 1957 (R. 383).

STATUTE INVOLVED

The following sections of the Federal Power Act (Act of June 10, 1920, c. 285, 41 Stat. 1063, *et seq.*) are involved: Sec. 4(e) (16 U.S.C. §797(e)), Sec.

7(a) (16 U.S.C. § 800(a)), Sec. 9(b) (16 U.S.C. § 802(b)), Sec. 21 (16 U.S.C. § 814), Sec. 313(b) (16 U.S.C. §825*l* (b)). These are printed in the Appendix.

QUESTIONS PRESENTED

The Federal Power Commission issued a license to the City of Tacoma, Washington, to construct a power project on the Cowlitz River, over the objections of the State of Washington that it would interfere with anadromous fish runs and would take State property. The State petitioned the Ninth Circuit Court of Appeals under Section 313 (b) of the Federal Power Act to review the Commission's order. That court affirmed the order and this Court denied certiorari. While that case was pending, Tacoma commenced the present action, a declaratory judgment proceeding in the State courts to validate a bond issue for construction of the project. After a decision of the State Supreme Court on the Taxpayers' demurrer to its complaint, favorable to Tacoma, the City commenced construction. The State intervened as an added defendant, and, on cross-complaint, obtained an injunction against sale of the bonds and construction of the project on the ground that it would interfere with public navigation. On appeal, the State Supreme Court affirmed, but on the ground that the project would inundate a State-owned fish hatchery which the State Game Commission refused to permit Tacoma to replace, and which the Federal Power Act did not and could not authorize Tacoma to condemn in the absence of such authorization by State legislation. The case is here on certiorari to that judgment.

The Petition for Certiorari (p. 3) presented the following question:

May a state enjoin construction of a dam and power plant affecting navigable waters of the United States, licensed by the Federal Power Commission, upon the ground that the power of eminent domain conferred by Section 21 of the Federal Power Act upon licensees cannot be exercised by a municipality to condemn lands dedicated by the state to a public use (here as a fish hatchery) within the project reservoir area, absent state legislation specifically conferring such authority?

This question is briefed at pp. 29-66, *infra*.

The Petition stated (p. 3) that should certiorari be granted upon the foregoing question, the petitioner requests the privilege of briefing and arguing the following question:

Is a state barred from litigating the authority of municipalities to condemn such property where the Federal Power Commission, in license proceedings to which the state was a party, has held that the applicant "has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project;" and the Federal Circuit Court of Appeals, on the state's petition for review, has sustained the Commission's order and license?

This question is briefed at pp. 66-78, *infra*.

The real contest, however, is not over the hatchery, but the dams: This contest has erupted now eight times in five tribunals. If the hatchery were being taken for some use not related to construction of a power dam, this case would not necessarily be here. The ultimate issue is whether the Federal Power Commission's comprehensive multiple-purpose plan of development of the Cowlitz River by a public power

agency for navigation, flood control, power, fish conservation, and recreation, or the State Game Commission's single-purpose plan for fish conservation, which would prevent construction of the dams, shall prevail. Secondarily involved is the issue of whether the resolution of this basic conflict between fishery and power resources made by the Federal Power Commission and the Ninth Circuit Court of Appeals shall have the finality prescribed by Section 313 (b) of the Federal Power Act.

STATEMENT OF THE CASE

The facts, in chronological order, are as follows:

1. Proceedings Before the Federal Power Commission

On December 28, 1948, the City of Tacoma, Washington, filed with the Federal Power Commission an application for a Federal license to construct a power project to include two dams on the Cowlitz River affecting navigable waters of the United States.[1]

The River

The Commission described the river in controversy as follows (R. 13):

> "The Cowlitz River, a tributary of the Columbia River in southwestern Washington, drains the

[1] On August 6, 1948, Tacoma filed a declaration of intention, under section 23 of the Federal Power Act, to build the Cowlitz Project (R. 12). The Governor and Director of Public Utilities of the State were notified (R. 13). They did not request a hearing on jurisdictional questions (R. 15). On March 8, 1949, the Commission found that the Cowlitz was navigable below the two dam sites (R. 15), that their construction would affect the navigable capacity of navigable waters of the United States and the interest of interstate or foreign commerce (R. 15), and that, as provided in section 23, a license under the Federal Power Act was required (R. 16). These findings remain unchallenged.

western slope of the Cascade Range from Mount Rainier on the north to Mount Adams and Mount St. Helens on the south. The Cowlitz flows westerly for about 100 miles, then turns south for 30 miles and joins the Columbia River at Longview, Washington, the point of junction being about 65 miles above the mouth of the Columbia River. At the point of junction both the Columbia and Cowlitz are tidal rivers and the Cowlitz has an average flow at the point of junction of about 10,000 cubic feet per second.[2] The Cowlitz has a total drainage area of 2,490 square miles."

The Hatchery

The State of Washington, through its Department of Fisheries and Department of Game, was granted leave to intervene in the license proceedings. The State contended that the license should be denied because of injury which the dams would cause to anadromous fish, asserted conflict of the project with "fish sanctuary" laws of Washington,[3] which prohibited construction of any dam higher than 25 feet on the Cowlitz and certain other streams, and alleged in its petition:

---

[2] Counsel's note: This equals about 7,200,000 acre-feet per annum. The Cowlitz thus has an annual average flow about equal to that of the Mississippi at St. Paul, or the Savannah at Augusta, and about seven-eighths of that of the Potomac at Washington. (U.S.G.S. Water Supply Papers 1388 (1955), 1383 (1955) and 1272 (1953).

[3] Laws 1949, ch. 9, RCW 75.20.010 et seq. Other State statutes pleaded at various times in this case by the State have included Laws 1949, ch. 112, §§ 46, 49, requiring a state permit for diversion of water: RCW 75.20.100; RCW 90.28.060, requiring state approval of plans for a dam, and of facilities therein for protection of fish; Laws 1917, ch. 117, § 27, as amended (RCW 90.20.010), requiring a state permit for appropriation of water; RCW 80.40.010, prohibiting obstruction of public navigation.

"That the reservoirs which would be created by the proposed dams would inundate a valuable and irreplacable fish hatchery owned by the State of Washington, as well as much productive spawning areas."[1]

This hatchery is the crux of the controversy now before this Court, as will appear. The State declined to permit its replacement outside the reservoir area at Tacoma's expense (R. 175), and denies Tacoma's power to condemn it under section 21 of the Federal Power Act.

After extensive hearings, consuming twenty-four days (R. 293) and resulting in a record of 4,392 printed pages (R. 294), the Commission entered an Opinion (R. 18) and Order (R. 27-48) for issuance of a license.

The Project

The project, as described by the Commission (Finding 2, R. 28-29; Finding 63, R. 40-42), will consist of two dams, Mossyrock and Mayfield, with appurtenant reservoirs and power plants, and a transmission line to Tacoma. Mossyrock Dam, to be located 65 miles above the confluence with the Columbia, will rise 510 feet above bedrock, and will have an installed capacity initially of 225,000 kilowatts and ultimately of 300,000 kilowatts (R. 40-41). Mayfield Dam, at mile 52, below Mossyrock, will rise 240 feet above bedrock and create a reservoir extending 13.5 miles upstream (to the foot of Mossyrock Dam). This is the reservoir which would flood the hatchery. Mayfield power plant will have an initial installed capacity of 120,000 kilowatts and an ultimate capacity

[1] The State's Petition is quoted in the dissenting opinion in the Supreme Court of Washington in the instant case (R. 292).

of 160,000 kilowatts (R. 41). The ultimate capacity is thus 460,000 kilowatts.[1] The cost estimated by the Commission was about $135,000,000 (R. 34), plus $7,100,000 for fish handling and protective facilities and hatcheries (R. 34), which the Commission increased to $9,465,000 (R. 38). These facilities are to be designed in cooperation with the State (R. 46). They include such hatcheries as the Commission may require, either on its own motion or on the recommendations of the Secretary of the Interior (R. 46).

The Conflict Between Fishery Resources and Power Resources

In the opinion which accompanied the order (Opinion No. 221, R. 18), the Commission carefully considered the conflict between the two uses of the water resource involved in the present dispute, for power and fish, and concluded (R. 26-27):

> "We are required to consider all of the possible advantages and disadvantages of the City's proposal from the standpoint of the greatest public benefit through the use of these valuable water and other natural resources. The question posed does not appear to us to be between all power and no fish but rather between large power benefits (needed particularly for defense purposes), important flood control benefits and navigation benefits, with incidental recreation and intangible ben-

[1] The opinion of the Commission (R. 18) points out that this would add about 10 per cent to the then existing total installed capacity in the Pacific Northwest power pool.

For comparison with the Cowlitz Project's ultimate installed capacity of 460,000 kilowatts, that of Bonneville Dam is 518,000 k.w. (Annual Report of U.S. Columbia River Power System, Fiscal Year 1956, p. 32); Shasta Dam, 379,000 k.w.; Hoover Dam, 1,249,800 k.w. (Annual Report of the Secretary of the Interior, Fiscal Year 1957, p. 46, Table 5).

efits, balanced against some fish losses, or a retention of the stream in its present natural condition until such time in the fairly near future when economic pressures will force its full utilization. With proper testing and experimentation by the City of Tacoma, in cooperation with interested State and Federal agencies, a fishery protective program can be evolved which will prevent undue loss of fishery values in relation to the other values. For these reasons we are issuing the license with certain conditions which are set forth in our accompanying order." (R. 26-27).

THE FEDERAL POWER COMMISSION'S FINDINGS

The Commission, in its order, found:

"(53) The Applicant is a municipal corporation; it has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project; and it is a municipality within the meaning of Section 3 (7) of the Act." (R. 39)

The Commission further found:

"(59) Under present circumstances and conditions and upon the terms and conditions hereinafter included in the license, the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes." (R. 39-40)

The Commission so defined the project boundaries and reservoir areas as to include the hatchery here in

question (Finding 63 (d), R. 42), and imposed navigation and flood control criteria which would require utilization of the Mayfield reservoir to its maximum elevation (Special Articles 34-35, R. 47-48), flooding the hatchery buildings (R. 292-3).

The Commission found:

> "(65) The Secretary of the Army and the Chief of Engineers have approved the project plans insofar as they affect the interests of navigation and flood control, upon the license conditions hereinafter provided for the protection of such interests." (R. 44)

The Commission inserted the following "special condition" in the license:

> "*Article 31.* The Licensee shall construct, maintain and operate such fish ladders, fish traps or other fish handling facilities or fish protective devices and make such stream improvements *and provide such fish hatcheries* and similar facilities and comply with such reasonable modifications of the project structures and operation in the interest of fish as may be prescribed hereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior." (Emphasis supplied.)[1] (R. 46.)

Issuance of the License

License issued November 28, 1951 (R. 48), and was accepted by Tacoma (Findings of Fact by Superior Court, Par. IV, R. 253). This license was amended February 24, 1954, to extend the time for commencement of the project to December 31, 1955 (R. 159, 160),

[1] For other "special conditions" for fish protection, see Article 30 (R. 46). For findings as to the relative value of the fishery resource and the cost to the licensee of the protective works required by the Commission, see Findings 43-51 (R. 37-38).

and construction was commenced within this time (Findings of Fact by Superior Court, Par. II, R. 253).

2. Review of the Commission's Order by the Ninth Circuit Court of Appeals

The State of Washington, with others, petitioned the Ninth Circuit Court of Appeals for review of the Federal Power Commission's order under Section 313 of the Federal Power Act, 16 U.S.C.A. Sec. 825*l* (b). On October 5, 1953, the Court handed down an opinion declining to interfere with the Commission's order. *State of Washington Department of Game, et al.* v. *Federal Power Commission,* 207 F. 2d 391 (9th Cir. 153), *cert. denied* 347 U. S. 936 (1954); (Reprinted as Appendix D, p. 112 (a), to the Petition for Certiorari in the present case). In the course of its opinion the court said:

P. 396 (App. D to petition, p. 121a):

> "Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States. However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them.[15a]"

"[15a] See City of Tacoma v. Taxpayers, et al., No. 32,411, which is now pending before the Supreme Court of the State of Washington."

Certiorari was applied for and denied: 347 U. S. 936 (1954).[1]

3. The Present Action: Proceedings on Demurrer to Tacoma's Complaint

Tacoma's Complaint

In the meantime, on February 3, 1952 (subsequent to the Commission's issuance of the license, but before the decision of the Ninth Circuit Court of Appeals), the City of Tacoma instituted in the State courts the present action against the Taxpayers of Tacoma and the Directors of Game and Fisheries of the State of Washington (R. 1). It was commenced in the Superior Court of Washington for Pierce County, February 3, 1952, under Rem. Rev. Stat. of Washington, Sec. 784-1, *et seq.*, relating to declaratory judgments, and Rem. Rev. Stat. of Washington, Section 5616-11, *et seq.*, providing for bond validation proceedings (R. 3).

Defendants' Pleadings

Representative taxpayers and their counsel were appointed by the Superior Court (R. 51). On March 27, 1952, the taxpayers filed a demurrer (R. 53).

On May 23, 1952, the Director of Fisheries and the Director of Game, by Assistant Attorneys General of the State of Washington, filed an amended answer and cross-complaint (R. 53).

On June 3, 1952, Tacoma filed a general demurrer to the Directors' Amended Answer and Cross Complaint (R. 56).

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[1] This Court in *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 443, Note 9 (1955), took note of the Ninth Circuit opinion in the Cowlitz case, referring to it as "somewhat of a companion case."

Superior Court's Opinion on Demurrer

On September 18, 1952, the Judge of the Superior Court for Thurston County (to which the case had been transferred from Pierce County by proceedings omitted from the printed record) filed a "Memorandum Opinion" sustaining the Taxpayers' demurrer to Tacoma's complaint (R. 57).

Tacoma stood on its complaint, and the Superior Court entered an order (R. 59) sustaining the demurrer and dismissing the complaint with prejudice.

Tacoma appealed (R. 61) and the Taxpayers and Directors cross-appealed (R. 62).

Thus the instant case stood when the Ninth Circuit Court of Appeals, on October 5, 1953, filed its opinion in *State of Washington Department of Game* v. *Federal Power Commission*, 207 F. 2d 391 (1954), *supra*.

Opinion of Supreme Court of Washington on Demurrer

On October 14, 1953, the Supreme Court of Washington filed an opinion (R. 65) reversing the Superior Court. It took note of the decision of the Ninth Circuit Court of Appeals, stating that that decision had been rendered subsequent to the preparation of its own opinion (R. 70). The court said:

* * *

(R. 89): "It is vigorously asserted by respondents and cross-appellants that appellant, being a municipal corporation created by the state, may not defy the laws of its creator. In other words, assuming that appellant ever had the power to construct dams on rivers resulting in the destruction of fish life, it is contended that the legislature has taken that right away with respect to the Cowlitz

river by enacting the fish sanctuary act (Chap. 9, Laws of 1949).

* * *

(R. 91): ". . . in the present case the right of appellant to proceed with the construction of this project is based on the Federal Power Act which, in turn, is based on the commerce clause of the Federal constitution. Fundamentally, it is the United States whose power to regulate commerce on navigable streams is primarily being questioned in this suit. Appellant's rights under its license from the power commission are governed by the Federal Power Act and have no relation to the Fourteenth Amendment nor to Art. I, § 10, of the Federal constitution.

* * *

"Paraphrasing the language of the supreme court in concluding its opinion in the *First Iowa* case, *supra*, we hold that:

"It is the Federal Power Commission rather than the Director of Fisheries and the Director of Game of the state of Washington which under our constitutional government must pass upon the measures necessary for the protection of anadromous fish in the navigable streams in this state on behalf of the people of Washington as well as on behalf of all the people of the United States."

Three Justices dissented.

Judgment on Demurrer

The Supreme Court of Washington entered its judgment December 14, 1953 (R. 63-64), reversing the judgment of the Superior Court, and remanding.

4. The Present Action: Proceedings from the Decision on Demurrer to Final Judgment

Pleadings

Answers were filed by the Taxpayers (R. 99). Tacoma demurred (R. 105), and the Superior Court sustained the demurrer (R. 105). The court entered an order (R. 121) which "absolved" them from any further defense or prosecution of the action.

On April 29, 1954, the Directors filed a "Second Amended Answer and Cross Complaint" (R. 114).

On May 7, 1954, plaintiff filed a demurrer (R. 117) to the Directors' second amended affirmative defense and cross-complaint (R. 116), and on the same date filed a reply thereto (R. 118).

There the matter rested in the Superior Court for more than a year, without action by that court.

Commencement of Construction

On June 21, 1955, Tacoma awarded bids for the sale of a block of bonds totaling $15,000,000 (R. 271), and on June 22, 1955, awarded construction contracts for the Mayfield Dam (R. 271). These aggregated $16,120,870 (R. 237).

Restraining Order

On June 24, 1955, the Directors "acting for and on behalf of the State of Washington", filed a motion in the Superior Court for a temporary restraining order and injunction *pendente lite* against the continuation of construction of the two dams and the sale of any bonds for construction of the Cowlitz development (R. 123).

On June 24, 1955, the Superior Court issued a temporary restraining order (R. 129), which was subsequently modified (R. 137-8, R. 202, R. 267, R. 377).

Pursuant to these modifications, approximately $7,000,000 has been spent on construction (R. 374).

Amended Complaint

On July 27, 1955, Tacoma moved (R. 138) to file an amended bill of complaint, for the purpose of incorporating certain amendments made within the preceding year to ordinance 14386, and to the Federal Power Commission license.

Addition of the State as a Party

On August 8, 1955, three and a half years after the City had filed this action, and almost two years after the decision of the Ninth Circuit, the State of Washington, "in its sovereign capacity", was added as a party defendant to the action (R. 143), on motion of the Directors of Game and of Fisheries made by the State's Attorney General (R. 140). The answer of the State and Directors (R. 191) alleged that the project would interfere with public navigation (R. 193, par. I), and revived the issue of the power of the City as a municipality of the State of Washington to condemn the same state-owned fish hatchery (R. 193, par. II; R. 194, item (e); R. 196, par. V) that the State and its Departments of Game and Fisheries had posed as a bar to the granting of a license in the proceedings before the Commission some five years previously (R. 292). It also alleged violation of Washington's statutes relating to navigation,[1] to application

[1] Previously the Attorney General had pleaded for the Directors that the Cowitz was non-navigable at the dam sites (R. 116).

and permit requirements for dams, and to water appropriation requirements, and prayed an injunction against construction of the project (R. 199).

Resolution of State Game Commission

Annexed to the answer and cross-complaint as Exhibit I (R. 199, 175) was a resolution of the State Game Commission adopted August 16, 1955, instructing the Director to refuse to sell, and, to resist condemnation of the hatchery here involved. The Commission called it "irreplaceable".

Annexed as Exhibit J (R. 199, 176) was an opinion of the United States District Court for the Western District of Washington, holding that Tacoma could not condemn portions of state highway in that court, but must proceed in the Superior Court for Lewis County.

Trial

The case was tried January 11, 1956. No transcript of the evidence appears in the printed record. From the certified typewritten record (which, by stipulation, may be referred to here), it appears that the testimony related altogether to navigation (Transcript, pp. 336-421) in response to the trial judge's written suggestion to counsel (R. 232-233).

Findings of Fact and Conclusions of Law

The Superior Court filed Findings of Fact (R. 252) and Conclusions of Law (R. 258) on February 27, 1956.

The Court found, among other facts:

> "VI. That the carrying out of the city's project, upon completion of the Mayfield dam

(which the city estimates to be about two years), and the closing of the gates thereof to fill the reservoir created thereby, will inundate a large portion of a state fish hatchery site held for game department purposes, flooding 61.63 acres [1] located in Section 11, Township 12 North, Range 2 East, W. M., in Lewis County, adjacent to the Cowlitz River, used for the propagation, rearing and conservation of game fish. Included in the portion so inundated will be all the fishponds and buildings of such hatchery, all of which are located above high water mark. The state game commission on August 16, 1955, adopted a resolution opposing the city's acquisition of this hatchery, a copy of which resolution is attached to defendants' amended answer and cross-complaint herein and marked Exhibit 'I'."

JUDGMENT OF SUPERIOR COURT

On March 6, 1956, the Superior Court entered its judgment (R. 260). It stated, *inter alia:*

(R. 260): "It Is Hereby Ordered, Adjudged and Decreed that the question of the capacity of the plaintiff to acquire property of the defendant, State of Washington, by eminent domain is not within the jurisdiction of this court.

(R. 261): "It Is Further Ordered, Adjudged and Decreed that the question of damage to fish which might result from construction of plaintiff's Cowlitz Project was passed upon by the Federal Power Commission and the Federal Courts and is not now a proper one for consideration by this Court.

"It Is Further Ordered, Adjudged and Decreed that Sections 27 and 36, Chapter 117, Laws of

[1] Counsel's note: The entire area of this hatchery site is 74.10 acres (R. 194).

1917, as amended (R. C. W. 90.20.010 and 90.28.-060) are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.

"It Is Further Ordered, Adjudged and Decreed that the provisions of Chapter 9, Laws of 1949, (R. C. W. 75.20.010 et seq), and Sections 46, and 49, Chapter 112, Laws of 1949, as amended R. C. W. 72.20.050 and 75.20.100), are inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.

"It Is Further Ordered, Adjudged and Decreed that the plaintiff is acting illegally and in excess of its authority in the construction of the Mayfield and Mossyrock hydroelectric project as presently proposed for the reason that said project would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of R. C. W. 80.40.010 et seq.

"It Is Further Ordered, Adjudged and Decreed that the injunction pendente lite, entered October 7, 1955, be continued in effect until July 1, 1956, from and after which later date plaintiff is hereby enjoined from spending any sums of money relating to the Mayfield and Mossyrock hydroelectric project."

Tacoma appealed (R. 262) and the Taxpayers, State, and Directors cross-appealed (R. 263).

Opinions of the Supreme Court of Washington

On February 7, 1957, the Supreme Court of Washington filed an opinion affirming the judgment of the Superior Court (R. 260). Three Justices dissented (R. 287-313). On a motion of Tacoma for rehearing and clarification (R. 313-344), the Court, on April 30, 1957, ordered filed (R. 371-372) an "addition to opinion" (R. 369-370), and entered its judgment (R. 372). The several opinions held as follows:

Majority Opinion of February 7, 1957 (R. 268-287)

The majority opinion (R. 268), after reciting the history of the case, said (R. 277):

> "Although this action has evolved into a Hydra-headed controversy, a single question at its nucleus is determinative of its disposition.
>
> "Does a municipal corporation, created by the state as a subordinate unit, have the power to condemn state lands held in a governmental capacity and previously dedicated to a public use; and if not, can a municipal corporation be endowed by Federal legislation with power to condemn such lands belonging to the state?"

After holding that neither the State court's earlier opinion on demurrer (R. 65), nor the decision of the Ninth Circuit in *State of Washington Department of Game, et al.* v. *Federal Power Commission*, 207 F. 2d 391 (1953) constituted res judicata on the issues involved here (R. 278), the court held (R. 279) that the trial court had erred in holding that the issue of Tacoma's power of eminent domain had not been before the court, and said:

> (R. 284): "We deem it conclusively settled in this jurisdiction that a municipal corporation or

a public corporation does not have the power to condemn state-owned lands dedicated to a public use, unless that power is clearly and expressly conferred upon it by statute.

* * *

(R. 286): "In the instant case, the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition;* it present a question of lack of *state statutory power* in the city. It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the state of Washington.

"The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal Power Act, as we read it, does not purport to do so.

"If it be held that the Federal government may endow a state-created municipality with powers greater than those given it by its creator, the state legislature, a momentous and novel theory of constitutional government has been evolved that will eventually relegate a sovereign state to a position of impotence never contemplated by the framers of our constitutions, state and Federal."

Dissenting Opinion

Three Justices dissented. In the course of the dissenting opinion Donworth J. said:

(R. 304): ". . . it is apparent that Congress intended to and did exercise its full power under the commerce clause in providing for the licensing of the projects described therein. When the power commission has made a finding as required by section 9 (b) that the licensee has complied with state laws with respect to the right to engage in the business of developing, transmitting, and dis-

tributing electric power and any other business necessary to effect the purposes of the licensee under the act, then the licensee becomes the agent of the Federal government in regard to the project. Upon the issuance of the license, all rights and obligations of the licensee are derived from congressional constitutional powers, and not those of the state where the project is located. See *First Iowa* case.

* * *

(R. 310): "The Federal power act in section 21 affords a licensee ample authority as an agent of the Federal government to exercise the power of eminent domain without state authority. A state may not deny or impair this authority once a license has been issued."

"ADDITION TO OPINION", APRIL 30, 1957

On April 30, 1957, the Supreme Court of Washington filed an order (R. 371-372) denying Tacoma's petition for rehearing (R. 313), but granting in part the petition for clarification (R. 372).

An "Addition to Opinion" (R. 369-371) filed April 30, 1957, states, *inter alia:*

(R. 370): "Based upon the present record, we agree with that portion of the judgment of the trial court which determines (1) that the question of damage to fish which might result from construction of the dams is not now a proper one for the consideration of the court; and (2) that Laws of 1917, chapter 117, §§ 27 and 36, as amended (RCW 90.20.010—state permit for appropriation of water; RCW 90.28.060—state permission to build a dam), Laws of 1949, chapter 9 (RCW 75.20.010 *et seq.*—establishing Columbia river fish sanctuary), and Laws of 1949, chapter 112, §§ 46 and 49, as amended (RCW 75.20.050—

state permit to divert water; RCW 75.20.100—approval of building plans for the protection of fish), are

> "'. . . inapplicable to said project insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of plaintiff's License for said project, or insofar as they would enable State officials to exercise a veto over said project.'

"Our conclusion is amply supported by *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U. S. 152 (1946).

"The same authority supports the conclusion that the trial court erred when it issued the injunction

> "'. . . for the reason that said project would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of R. C. W. 80.40.010 et seq.'

"However, we have held on many occasions that if the judgment of the trial court is based upon erroneous grounds, it will be sustained, if correct on any grounds within the pleadings and established by the proof. *Ennis* v. *Ring*, 149 Wash. Dec. 279, 283, 300 P. (2d) 773 (1956). We have already held that the question of the capacity of the plaintiff to acquire property of the state of Washington by eminent domain is within the jurisdiction of the court; and that the city of Tacoma has not been endowed with the statutory capacity to condemn state lands previously dedicated to a public use. Without this power, it cannot accomplish the plan set forth in the city ordinances before us; hence, for the reasons we have discussed herein, the judgment of the superior court is affirmed."

JUDGMENT (R. 372) AND STAY (R. 377)

The judgment of the Supreme Court of Washington (R. 372) was entered April 30, 1957. A stay of execution (R. 377) was ordered May 7, 1957.

CERTIORARI (R. 383)

This Court entered its order allowing certiorari (R. 383) on December 9, 1957.

SUMMARY OF ARGUMENT

In its "Addition to Opinion" the court held that none of the express state laws (1) requiring a state permit for appropriation of water, (2) requiring a state permit to build a dam, (3) limiting the height of dams to 25 feet, (4) requiring approval of building plans by the Directors of Game and Fisheries for the protection of fish, or (5) prohibiting interference with public navigation, could bar or incapacitate the City from proceeding with the Cowlitz project under its federal license. Thus the court decided that the City was empowered to undertake the project on all issues except one—the *"lack of state statutory power* in the city" to condemn the hatchery lands (R. 286). Upon this sole issue the court affirmed the injunction against the petitioner's construction of the Cowlitz dams.

The court below held, in substance, (1) that the Federal Power Act does not purport to confer on this licensee the power to condemn state-owned lands dedicated to a public use absent authorization by the State legislature, and, (2) if it did so, the Federal Power Act, so applied, would be unconstitutional (R. 286). We say that the Act does confer this power and is constitutional. The issue of statutory interpretation

is discussed in Part I of the Argument, the constitutional issue in Part II. Part III discusses the finality accorded by Section 313 (b) of the Federal Power Act to the decision of the Ninth Circuit Court of Appeals on review of the Commission's order granting the license, which we say disposed of the State's present contentions.

I. As to statutory interpretation.

The language of the statute is plain. Section 21 of the Federal Power Act confers a federal right of eminent domain upon licensees to take the property of others necessary to a project found by the Federal Power Commission justified and desirable in the public interest for the development of a waterway for the benefit of interstate or foreign commerce. The Commission found those conditions to exist. The act does not exclude municipalities from this grant of the power of eminent domain to licensees. To the contrary, Section 3 (5) defines "licensee" to include municipalities, Section 4(e) authorizes licenses to municipalities, and Section 7 (a) directs the Commission to give preference to municipalities in considering applications for a license.

Section 21 is a delegation of federal power, not derived from the state, not dependent upon state acquiescence or upon concurrent state legislation. In this respect it follows the pattern of other federal condemnation statutes which have been judicially construed. When Congress has required state concurrence, it has said so.

Section 21 does not, expressly or by inference, exclude state-owned land from its effect, even though such property has been devoted to a public use. Both

this act and the earlier acts upon which it is patterned have been so construed.

No problem of compensation is involved. Tacoma offered full replacement. The court below denied the licensee's power to condemn in any court, irrespective of amount.

If Section 21 is interpreted as it was below, a device to enable a state to veto a project under the Federal Power Act, sought unsuccessfully in a series of cases in this Court from *New Jersey* v. *Sargent*, 269 U.S. 328 (1926) through *First Iowa Hydro-Electric Coop.* v. *Federal Power Com'n.*, 328 U.S. 152 (1946) to *Federal Power Com'n.* v. *State of Oregon*, 349 U.S. 435 (1953), has been discovered: acquisition by a state, through purchase or condemnation, of land in a reservoir area, dedication thereof by a state commission to the particular public purpose to which that commission is devoted, and refusal to sell.

In such event, the Cowlitz Project, and others similarly situated, could be developed, if at all, only by private power companies or by the Federal Government, not by municipalities or other state-created public power entities. The Federal Power Act did not intend this result. It is avoided by a proper interpretation of Section 21 as encompassing municipal licensees in the full power of condemnation which is granted therein to all licensees. The Commission, not the licensee, determines the area to be taken. The courts may properly protect against its abuse by any licensee, public or private. This is not such a case. The Federal Power Commission was required by the act to weigh the conflicting public interests, did so, and the Ninth Circuit affirmed.

II. As to constitutionality.

This Court has upheld the constitutionality of each of the sections of the Federal Power Act it has considered, as within the plenary power of Congress over navigable waters. While it has not expressly ruled upon Section 21, the Court has approved other sections of the Act imposing federal conditions upon licensees in addition to the requirements of state law. Further, in the *First Iowa* and *Federal Power Com'n.* v. *Oregon* cases, all state laws duplicating or conflicting with "the detailed provisions of the Act" were deemed superseded.

The cases are clear that the Federal Government, when acting pursuant to its constitutional powers for the improvement of a navigable waterway, has power to condemn state-owned land dedicated to a public use. State consent has been uniformly rejected as a condition precedent to the exercise of this federal power.

The authorities are many and long standing that Congress may validly endow state and municipal corporations with federal powers, including eminent domain powers, in addition to or irrespective of their powers or capacity under state law. This device, which had its inception in *Gibbons* v. *Ogden*, has been employed many times by Congress for the construction of bridges, turnpikes, railroads, telegraph lines and dams, for the improvement of interstate commerce.

The State of Washington cannot complain of this. It has authorized its municipalities to engage in the power business and acquire federal licenses under the Act. Having subjected its "creatures" to the commerce clause, the State may not preclude applicability of the particular incidents thereof. Under Congress'

power to regulate interstate commerce, charter or cor
porate limitations under state law are no bar to com
pliance with federal requirements.

III. As to the effect of the decision in the Ninth Circuit Court of Appeals.

Section 313 (b) of the Federal Power Act, author
izing review of an order of the Federal Power Com
mission by a Circuit Court of Appeals, directs that th
finding of the Commission as to facts, if supported b
substantial evidence, shall be conclusive, and that th
judgment of that court shall be final, subject to re
view by this Court upon certiorari. The State par
ticipated in the proceedings before the Commission
objected to issuance of the license upon the ground
inter alia, that the project would inundate its prop
erty, including specifically this hatchery, and peti
tioned the Ninth Circuit Court of Appeals for review
of the Commission's order on the general ground
inter alia, that the project would take its property
The record before that court identified the property a
including the hatchery. The Ninth Circuit Court o
Appeals affirmed the Commission's order, *State o
Washington Dept. of Game* v. *Federal Power Com'n*
207 F. 2d 391 (9th Cir. 1953). The State petitioned
this Court for certiorari, again asserting, in genera
terms, that the project would take its property, with
out specifying the items. This Court denied certiorari
347 U.S. 936 (1954).

In these circumstances, the State's present suit for
an injunction, which it contends is a "fresh lawsuit"
initiated by its cross-complaint on August 8, 1955, is
a collateral attack upon the Commission's order. It
would veto the Commission's license by indirection as

effectively as would the state statutes which vetoed it directly, and which were struck down by the Ninth Circuit. The present attack is barred specifically by the terms of Section 313 (b) as well as by general principles of res judicata.

ARGUMENT

I. AS A MATTER OF STATUTORY INTERPRETATION, SECTION 21 OF THE FEDERAL POWER ACT GRANTS TO THE GOVERNMENT'S LICENSEES A FEDERAL RIGHT OF EMINENT DOMAIN, NOT CONTINGENT UPON CONCURRENT STATE AUTHORIZATION, TO TAKE STATE-OWNED PROPERTY, EVEN THOUGH DEVOTED TO A PUBLIC USE

A. The plain language of the statute.

Section 21 provides, in pertinent part:

> "When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, *it may acquire the same by the exercise of the right of eminent domain* in the district court of the United States for the district in which such land or other property may be located, or in the State Courts. . . ." (16 U.S.C.A. § 814). (Emphasis supplied.)

In terms, Section 21 confers identical powers, (whatever those powers may be) upon "any licensee", certainly not excluding municipal licensees. The prop-

erty subjected to these powers is the "lands or property of others" which cannot be voluntarily acquired, not excluding, in terms at least, the property of the State. The condition to exercise of these powers, to take property which cannot be voluntarily acquired, is alike as to all "licensees", and as to "all lands or property of others". The condition is that the property in question shall be necessary to the construction or operation of works of specified kinds (including dams and reservoirs), in conjunction with an improvement which in the judgment of the Federal Power Commission (not the licensee) is desirable and justified in the public interest for the purpose of improving or developing a waterway for the use or benefit of interstate or foreign commerce. That condition having been met, as it has in this case, the power delegated to the licensee is that "it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. . . ."

The language of the statute, on its face, clearly appears to confer on Tacoma the power asserted. But, as the holding was against us on the issue of statutory construction as well as on the issue of constitutionality (R. 286), the problem of interpretation is examined below.

B. Section 21 of the Federal Power Act is an independent delegation of federal power of eminent domain, not a mere acquiescence in the exercise of a power derived from the State.

Section 21 has not been directly construed by this Court. It was cited but not passed upon in *Ford & Son* v. *Little Falls Fibre Co.*, 280 U.S. 369, 379 (1930),

and *Grand River Dam Authority* v. *Grand Hydro*, 335 U.S. 359, 373 (1948), and *Federal Power Com'n.* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 254 (1954).

In *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, 328 U.S. 152 at 180-81, the Court, after describing the Act as

> ". . . the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, ..."[1]

said:

> "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.[25] . . ."

In footnote 25, the Court lists, among other items:

> ". . . § 21, federal powers of condemnation vested in licensee . . ."

In the *First Iowa* case the Court, in its detailed analysis of Section 9 (b) as enacted, noted the failure of Congress to adopt a proposed proviso requiring "*the consent of the State or States* in which the dam or other structure for the development of the water power is proposed to be constructed,"[2] and construed the section as follows:

[1] See also *United States ex rel. Chapman* v. *Federal Power Com'n.*, 345 U.S. 153, 167-8 (1953).

[2] Shields Bill, S. 1419, 65th Cong., 2d Sess. (1917), noted in *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n*, 328 U. S. at 179 (1946).

". . . It provides for presentation of information to the federal commission and protects the constitutional rights of the States. This explanation does not support the contention of the State of Iowa that § 9 (b) amounts to the subjection of the federal license to requirements of the state law *on the same subject. . . .*" *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, 328 U. S. 152, 179 (1946) (Emphasis supplied.)

This Court construed Section 27 as follows:

"The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. . . .

. . . . . .

"This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, *in those fields, where rights are not thus 'saved' to the states, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course.*" (*First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, 328 U. S. 152 at 175-176 (1946).) (Emphasis supplied.)

By 1920, when Section 21 was written, a considerable number of federal condemnation statutes had been judicially construed, and it had been firmly established that the Federal Government was exercising in these statutes a federal power necessary to the accomplishment of its constitutional functions, not contingent on state acquiescence. *Kohl* v. *United States*, 91 U.S. 367 (1876); *Chappell* v. *United States*, 160 U.S. 499 (1896); *Luxton* v. *North River Bridge Co.*, 147

U.S. 337 (1893); *United States* v. *Jones*, 109 U.S. 513 (1883).

Statutes delegating such powers to non-federal agencies had been similarly construed: *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U.S. 641 (1890); *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9 (C.C.D.N.J. 1887.)[1]

Cases construing Section 21 as similarly conferring an independent power of eminent domain, not founded on state law, include *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606 (M.D. Ala. 1922), cited with approval by this Court in *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, 328 U.S. 152, 176 (1946); *Missouri* v. *Union Electric Light & Power Co.*, 42 F. 2d 692 (C.D. Mo. 1930), quoted below in another connection.

In subsequent cases, the right of a licensee, to invoke Section 21 as a federal grant of power, has generally been accepted without question. See *Wilson* v. *Union Electric Light & Power Co.*, 59 F. 2d 580, 581 (8th Cir. 1932); *Feltz* v. *Central Nebraska Public Power and Irrigation District*, 124 F. 2d 578, 582-583 (8th Cir. 1942); *Central Nebraska Public Power and Irrigation District* v. *Fairchild*, 126 F. 2d 302, 304 (8th Cir. 1942); *Central Nebraska Public Power and Irrigation District* v. *Harrison*, 127 F. 2d 588, 589 (8th Cir. 1942); *cf. Oakland Club* v. *South Carolina Public Service Authority*, 110 F. 2d 84, 85-86 (4th Cir. 1940).

Section 21, in turn, was the pattern for Section 7 (h) of the Natural Gas Act, which was added

[1] These and similar cases are referred to in Part II, pp. 58-62, with reference to the constitutional question.

to the original 1938 Act by a special amendment in the Act of July 25, 1947 (61 Stat. 459, 15 U.S.C.A. § 717 f (h)). The legislative history reveals that Congress considered that it had made a similar grant of federal eminent domain powers in the earlier analogous Section 21 of the Federal Power Act. The House Committee Report said:

> "The proposed amendment provides generally for the exercise of the right of eminent domain by natural-gas companies with respect to necessary rights-of-way in connection with the construction and operation of natural-gas pipe lines. *This proposed amendment is similar to section 21 of the Federal Power Act which provides for the exercise of the right of eminent domain by licensees regarding dam sites.*" (H. Rept. No. 695 on H. R. 2956, 80th Cong. 1st Sess. (1947); 1947 U. S. Code Cong. Service, p. 1477.) (Emphasis supplied.)

See *Thatcher* v. *Tennessee Gas Transmission Co.*, 180 F. 2d 644 (5th Cir. 1950), *cert. denied*, 340 U.S. 829 (1950) and *Williams* v. *Transcontinental Gas Pipe Line Corp.*, 89 F. Supp. 485 (W.D.S.C. 1950), referring to the Natural Gas Act as a "grant" by Congress of the power of eminent domain.

In short, Section 21 is an independent delegation of authority by the Federal Government, and should not be construed as requiring concurrent authorization by the State as a condition to its exercise.

C. The delegation of federal eminent domain powers made to licensees by Section 21 includes municipal licensees.

Section 21 confers federal eminent domain powers upon an authorized "licensee" under the Act to take lands necessary for a project. Section 3 (5)[1] defines

[1] 16 U.S.C.A. § 796 (5).

"licensee" to mean "any person, State, or *municipality* licensed under the provisions of section 4 of this act, . . ." Section 4 (e)[1] authorizes the Commission to issue licenses "to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or *municipality*. . . ." Congress' special regard for municipalities as licensees is shown in Section 7 (a)[2] of the Act which requires the Commission to grant preference to license applications by states and municipalities.

The legislative history of Section 21 supports the clear intent of the Act that Congress intended municipalities to be recipients of the eminent domain powers conferred thereunder. Earlier versions of Section 21 considered by the Congress expressly restricted the grant of the right of eminent domain to state and municipal licensees and public utility or service corporations.[3] The later amendment[4] to its present form to include all licensees indicates no slackening of concern by Congress for municipalities as grantees.

The federal right of eminent domain granted by Section 21 has been exercised by municipalities and related state agencies, when duly licensed, in a number of cases without question. See *Central Nebraska Public Power and Irrigation District* v. *Harrison,* 127 F. 2d 588, 589 (8th Cir. 1942); *Central Nebraska Public Power and Irrigation District* v. *Fairchild,* 126 F. 2d

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[1] 16 U.S.C.A. § 797 (e).

[2] 16 U.S.C.A. § 800 (a).

[3] See S. 1419, 65th Cong., 2d Sess. (1918).

[4] See H. R. 3184, 66th Cong., 2d Sess. (1920).

302, 304 (8th Cir. 1942); *Feltz* v. *Central Nebraska Public Power and Irrigation District,* 124 F. 2d 578, 582-583 (8th Cir. 1942); *cf. Oakland Club* v. *South Carolina Public Service Authority,* 110 F. 2d 84, 85-86 (4th Cir. 1940).

D. Section 21 does not, expressly or by inference, except from its effect state-owned lands or property, even though devoted to a public use.

Section 21 makes no exemption for state lands.

In *Missouri* v. *Union Elec. Lt. & Power Co.,* 42 F. 2d 692 (C.D. Mo. 1930), a frequently cited case, a condemnation under Section 21 of the Federal Power Act was sustained, although the project would create a lake over 100 miles long, "result in submerging both public and private property, including the courthouse and jail", inundate public highways, and divide a county into three parts inaccessible to the other parts. The court said (p. 698):

> "In the instant case the Congress must have contemplated this identical situation; hence the requirement of notice. Moreover, the proposed improvements could not be accomplished, except through the exercise, if necessary, of eminent domain against property already dedicated to public use. To deny the right of eminent domain as against this public property would not only defeat the functions of the national government, but would run contrary to the obvious intent of the Congress as expressed in the Water Power Act. Stockton, Attorney General, v. Baltimore & New York RR Co. (C. C.) 32 F. 9; 20 C. J. § 90, P. 602; Vermont Hydro-Electric Corporation v. Dunn et al., 95 Vt. 144, 112 A. 223, 12 A. L. R. 1495; Imperial Irrigation Co. v. Jayne, 104 Tex. 395, 138 S. W. 575, Ann. Cas. 1914 B, 322."

To make the Federal Power Act's licensing system operate on navigable streams, state-owned lands must

be occupied by every licensee. It was well known at the time of passage of the original Federal Water Power Act in 1920 that the states owned the bed and banks of all navigable streams. *Pollard* v. *Hagan*, 3 How. 212 (U. S. 1845); *Shively* v. *Bowlby*, 1952 U. S. 1, 26, 27 (1894); *Scott* v. *Lattig*, 227 U. S. 229, 242, 243 (1913); *Donnelly* v. *United States*, 228 U. S. 243, 260 (1913).[1]

These state-owned bed and banks of navigable streams were the very lands that Congress directed the Commission to license dams upon, in order to carry out the purposes of the Act "to secure a comprehensive development of national resources".[2] Section 4 (e) empowered the Commission to issue licenses:

> "... *for the purpose of constructing, operating, and maintaining dams,* water conduits, *reservoirs,* power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, *along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States,* ..." (16 U.S.C.A. § 797 (e)). (Emphasis supplied.)

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[1] Subsequent cases affirmed the rule with respect to navigable streams: *Oklahoma* v. *Texas*, 258 U. S. 574, 583 (1922); *United States* v. *Holt State Bank*, 270 U. S. 49, 55 (1926); *Massachusetts* v. *New York*, 271 U. S. 65, 89 (1926); *United States* v. *Utah*, 283 U. S. 64, 75 (1931); *cf. United States* v. *California*, 332 U. S. 19, 30-31, 36-39 (1947), where the Pollard rule was limited to inland navigable waters.

[2] *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm.*, 328 U. S. 152, 181 (1946).

Where a dam site is in or affects navigable waters, not only the dam site but lands in the reservoir area can be taken pursuant to the dominant federal servitude. Cf. *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956).[1]

The argument that, by necessary implication, state-owned lands are excluded from the intended scope of a condemnation statute is not new.

In *United States* v. *Carmack*, 329 U. S. 230, 240 (1946), the Court quoted with approval Mr. Justice Bradley's opinion in *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9 (C.C.D.N.J. 1887):

> " 'The argument based upon the doctrine that the states have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words but of things. If it is necessary that the United States Government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it. Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the constitution that the government of the United States is invested with full and complete power to execute and carry out its purposes.' "

[1] No question of compensation is involved in our case. Tacoma offered to pay the full cost of relocation of the hatchery it seeks to condemn. The State Game Commission refused (R. 175).

See also *State of Minnesota* v. *United States*, 125 F. 2d 636, 639 (8th Cir. 1942); *Yalobusha County* v. *Crawford*, 165 F. 2d 867, 868 (5th Cir. 1947).

This Court has previously rejected attempts by states to exclude their lands and operations from general federal regulatory acts. In *Case* v. *Bowles*, 327 U. S. 92, 99 (1946), it was held:

> "... Petitioner[1] presses this contention so far as to urge us to accept as a general principle that unless Congress actually uses the word 'state', courts should not construe regulatory enactments as applicable to the states. This Court has previously rejected similar arguments,[5] and we cannot accept such an argument now."[2]

See also *California* v. *Taylor*, 353 U. S. 553, 561-565 (1957).

The State and Directors below continually stressed the specter of a taking of the State Capitol grounds. This Court refused to be frightened by that same ghost on a previous occasion.[3] It is sufficient for present purposes to cite the sage advice of Mr. Justice Frankfurter:

> "The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happened in the real world and devising doctrines sufficiently comprehensive in

[1] Commissioner of Public Lands of the State of Washington. The Commissioner contended that a sale of state lands was exempt from the Emergency Price Control Act.

[2] In footnote 5, the Court cited *Ohio* v. *Helvering*, 292 U. S. 360, 370; *United States* v. *California*, 297 U. S. 175, 186; *California* v. *United States*, 320 U. S. 577, 585.

[3] *City of St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 101 (1893).

detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court. . . ." (*New York* v. *United States*, 326 U. S. 572, 583 (1946).)

The ultimate conflict here is between the plan for development of the Cowlitz River prescribed by the Federal Power Commission and the plan of the State Game Commission.

The hatchery, the one remaining obstacle, is incidental to this clash between the Federal and State plans, which has now appeared on eight occasions in five tribunals. Its presence in a reservoir area is a geographical accident. The hatchery can be relocated; the dams cannot. The present conflict of public purposes must be resolved in favor of the Federal Government when acting pursuant to its delegated constitutional powers. *Arizona* v. *California*, 283 U. S. 423 (1931); *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940); *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508 (1941).

E. The Federal Government, through the Federal Power Commission, determines the necessity of the taking under Section 21, and that has been done.

Section 21 of the Federal Power Act, while authorizing licensees to prosecute condemnation actions, reserves to the judgment of the Commission itself the selection of the site and lands to be taken:

"When any licensee cannot acquire . . . the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir . . . in conjunction with an improvement which *in the judgment of the Commission is desirable and justified in the public interest for the*

purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce. . . .'" (16 U.S.C.A. § 814.) (Emphasis supplied.)

The Federal Power Commission, in these same terms, has found the Cowlitz Project "best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes." (Finding 59, R. 39-40) The project thus described by the Commission (Finding 2, R. 28, Finding 63, R. 40-44), operated at elevations required by the Commission in the interests of navigation and flood control (Special Conditions 34, 35, R. 47-48), will inundate the hatchery, as the State represented to the Commission it would (R. 292-3).

The Federal Power Commission thus identified the Cowlitz dam sites and specified the reservoir areas to be covered by each. See *In Re Condemnations for Improvement of Rouge River,* 266 F. 105 (E. D. Mich. 1920). The general authority given by Section 21 is ample for the taking of any state lands necessary for the federal project, in that the Commission, not Tacoma, has determined the necessity for the taking, and the lands to be included. *Cf. United States* v. *Carmack, supra; United States* v. *State of South Dakota,* 212 F. 2d 14, 16 (8th Cir. 1954); *Yalobusha County* v. *Crawford,* 165 F. 2d 867 (5th Cir. 1947); *United States* v. *State of Montana,* 134 F. 2d 194, 196 (9th Cir. 1943), *cert. denied,* 319 U. S. 772; *State of Minnesota* v. *United States,* 125 F. 2d 636 (8th

Cir. 1943); *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970 (9th Cir. 1932), *decree vacated as moot*, 289 U. S. 705 (1933); *Ryan* v. *Chicago B. & Q. R. Co.*, 59 F. 2d 137, 142 (7th Cir. 1932); *United States* v. *.8677 Acre of Land in Richland County*, 42 F. Supp. 91 (E.D.S.C. 1941); *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372 (D. Md. 1939); *United States* v. *City of Tiffin*, 190 F. 279, 281 (C. C. N. D. Ohio, 1911).

F. If Section 21 were now construed to exclude municipal licensees from the full scope of the power of eminent domain conferred upon licensees in general, the result would be to restrict development of projects in the present situation to the Federal Government or private power companies. This was not the intent of Congress.

If the hatchery cannot be taken, the project cannot be built.

If the project is not built, the Federal Power Commission has described the alternative (which the court's decision below would impose), as "a retention of the stream in its present natural condition until such time in the fairly near future when economic pressures will force its full utilization." (R. 27)

Utilization by whom?

The court below speaks of the necessity that a licensee which is "a municipal corporation or a public corporation" must obtain power from the state legislature to condemn this hatchery in order to build this project (R. 284). "It only questions the capacity of a municipal corporation of this state to act under such license when its exercise requires the condemnation of state-owned property dedicated to a public use" R. 285). The dissenting opinion on demurrer contended that a state statutory prohibition against

these Cowlitz dams should be sustained as against Tacoma as a creature of the State even though not applicable as a bar to development by others (R. 94), *i.e.*, private power companies.

If the opinion below, by its careful reference to "a municipal corporation or a public corporation" (R. 284) intends its "creature of the state" argument to disable only public power agencies of the State of Washington from constructing the Cowlitz Project, then this project can only be built, if at all, by a private power company[1] or by the Federal Government. The "creature of the state" argument does not exclude a foreign corporation licensed by the Federal Power Commission. *Cf. Seaboard Air Line R. Co.* v. *Daniel*, 333 U. S. 118 (1948).

But if the opinion means that no licensee, public *or* private, can build the Cowlitz Project without the State's consent to the inundation of this hatchery, it means that only the Federal Government can condemn this hatchery and build these dams. The Commission was authorized by Section 7 (b) to reserve this site for development by the United States, but it authorized Tacoma to develop it, as the plan best adapted to the public interest. *Cf. United States ex rel. Chapman* v. *Federal Power Com'n.*, 345 U.S. 153 (1953). Congress, on many occasions, has elected to authorize non-federal agencies to build projects under delegated federal powers, instead of building them itself, and this Court has sustained it.[2] The Federal Power Act, itself, is an outstanding example. This decision, if it stands,

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[1] Other alternatives, such as construction by a municipality of another state, or by the State of Washington, can be disregarded for obviously practical reasons.

[2] See cases cited in Part II, pp. 52-62.

vitiates that objective with respect to the licensees whom Congress said in Section 7 (a) it preferred to have, and perhaps with respect to all licensees.

The result, in either case, is a veto by the State Game Commission, in its administrative judgment (Resolution, R. 175), of the federal statutory structure, a veto of the preference granted by Section 7 (a) of the Federal Power Act to municipalities, a veto of the Federal Power Commission's determination as to the best-adapted project, and a veto of its finding as to the necessity for early construction of this project in the public interest. The result would necessarily be abandonment of the project or the substitution of another plan or of another licensee not measuring up to the federal statutory specifications as applied by the Federal Power Commission in its expert judgment.

Congress did not intend to subject projects licensed by the Federal Power Commission to the veto of a state, whether expressed by legislation or by administrative rulings, as here. See *New Jersey* v. *Sargent*, 269 U. S. 328 (1926); *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940); *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, 328 U. S. 152 (1946); *Iowa* v. *Federal Power Com'n.*, 178 F. 2d 421 (8th Cir. 1949), *cert. denied*, 339 U. S. 979 (1950); *State of Washington Dept. of Game* v. *Federal Power Com'n.*, 207 F. 2d 391 (9th Cir. 1953), *cert. denied*, 347 U. S. 936 (1954); *Wisconsin* v. *Federal Power Com'n.*, 214 F. 2d 334 (7th Cir. 1954), *cert. denied*, 348 U. S. 883 (1954); *Federal Power Com'n.* v. *State of Oregon*, 349 U. S. 435 (1955).

Congress granted the power of eminent domain in Section 21 to licensees in order to break log-jams, not

to create them. In Section 7, it directed preference, not disablement, for municipal licensees.

The court below, on the first appeal, said:

> (R. 91): ". . . Having been granted a license by the power commission, we hold that appellant is at the present time in the same position as any other licensee under the act."

The second decision gives municipal licensees a good deal less. With all respect, we think its interpretation of the Federal Power Act was more nearly correct the first time.

II. THE GRANT BY SECTION 21 OF FEDERAL EMINENT DOMAIN POWERS TO THE PETITIONER, A MUNICIPAL LICENSEE AUTHORIZED UNDER THE ACT, IS A VALID EXERCISE BY CONGRESS OF ITS DELEGATED POWER UNDER THE CONSTITUTION OVER INTERSTATE COMMERCE, WHICH MAY NOT BE VETOED BY THE STATE OF WASHINGTON

A. No Section of the Federal Power Act has been ruled unconstitutional and all State efforts to veto licensed projects have been rejected by the Court.

The first state attack upon the constitutionality of the Federal Water Power Act of 1920 reaching this Court was *New Jersey* v. *Sargent*, 269 U. S. 328 (1926), an original action filed by New Jersey against the Attorney General of the United States and members of the Federal Power Commission. This Court dismissed the bill for lack of a justiciable controversy, but only after stating:

> ". . . the power to regulate interstate and foreign commerce, which the Constitution vests in Congress, includes the power to control, for the purposes of such commerce, all navigable waters which are accessible to it and within the United States, whether within or without the limits of a state

> . . .; *and that the authority and rights of a state in respect of such waters within its limits, and in respect of the lands under them, are subordinate to this power of Congress.*" (p. 337) (Emphasis supplied.)

In *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940), this Court, in a sweeping opinion, upheld the validity of sections 10a, 10c, 10d, 10e and 14 of the Act[1] over the objections of forty-one States joining the respondent as *amici*. To the objection that Congress could not impose federal conditions upon the respondent power company in addition to its obligations under state law, this Court stated:

> ". . . The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. *It may likewise grant the privilege on terms.* It is no objection to the terms and to the exertion of the power that 'its exercise is attended by the same incidents which attend the exercise of the police power of the states.' The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment." (p. 427) (Emphasis supplied.)[2]

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[1] 16 U.S.C.A. §§ 803(a), 803(c), 803(d), 803(e) and 807. These provide for conditions in licenses concerning maintenance and repair of project works, setting up of amortization reserves, payment of annual charges, and the right of the Government to take over project works.

[2] In answer to the specific objection to the recapture rights of the Federal Government under Section 14, the Court stated:

> ". . . Since the United States might erect a structure in

In *First Iowa Hydro-Electric Coop.* v. *Federal Power Comm.*, 328 U. S. 152 (1946), this Court held that requirements of state law which conflict with or duplicate the express federal rights and powers granted by the Act are void.

The Court stated:

> "To require the petitioner to secure the actual grant to it of a State permit under § 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government" (p. 164).
>
> ". . . The contention of the State of Iowa is comparable to that which was presented on behalf of 41 States and rejected by this Court in United States v. Appalachian Electric Power Co., 311 U. S. 377, 404, 405, 426, 427 . . ." (pp. 181-182)

In *State of Wash. Dept. of Game* v. *Federal Power Com'n.*, 207 F. 2d 391 (9th Cir. 1953), *cert. denied*, 347 U. S. 936 (1954) (Appendix D), a prior proceeding in the present controversy (discussed, *infra*, pp. 67-75), the court held invalid, on the strength of the *First Iowa* case, those asserted provisions of Wash-

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these waters itself, even one equipped for electrical generation, it may constitutionally acquire one already built.

"Such an acquisition or such an option to acquire is not an invasion of the sovereignty of a state. . . ." (p. 428.)

Section 21, like Section 14, is at least equally related to navigation in that the exercise of the right therein is a prerequisite to the very construction of the project.

ington law which would prevent the City of Tacoma from building the Cowlitz Project. The court held:

> "The Commission in our case acted within the scope of its discretion in not requiring Tacoma to show compliance with the laws of the State of Washington regulating the construction of dams in Washington, because compliance with those laws would have prevented the development of the Cowlitz Project; and in the opinion of the Commission of the Cowlitz Project was 'best adapted to a comprehensive plan' for the development of a concededly navigable stream. The Federal Government's Constitutional authority to regulate commerce and navigation includes the 'power to control the erection of structures in navigable waters,' United States v. Appalachian Power Co., 1940, 311 U. S. 377, 405, 61 S. Ct. 291, 298, 85 L. Ed. 243. The Federal Government's power over navigable waters is superior to that of the state. McCready v. Virginia, 1876, 94 U. S. 391, 24 L. Ed. 248." (p. 396)

The latest attempt by a state to condition construction of a licensed project upon compliance with state law was rejected by this Court in *Federal Power Com'n.* v. *Oregon,* 349 U. S. 435 (1955). There Oregon, joined by several other states as *amici,* contended *inter alia,* that the licensee must obtain the consent of Oregon for construction of a proposed dam on the Deschutes River and comply with Oregon laws for the protection of anadromous fish. In rejecting the State's contention, this Court stated:

> ". . . To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the First Iowa decision. 328 U. S. 152, 177-179, 90 L. ed. 1143, 1156-1158, 66 S.

Ct. 906. No such duplication of authority is called for by the Act. The Court of Appeals in the instant case agrees. 211 F. 2d, at 351. And see Washington Dept. of Game v. Federal Power Com. (C. A. 9th) 207 F. 2d 391, 395, 396. . . ." (p. 445).

Hence, this Court has consistently upheld the validity of those "detailed provisions of the Act" it has considered, and uniformly rejected any necessity that licensees comply with conflicting or duplicating state requirements.

". . . In such matters there can be no divided empire." *Green Bay & M. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 80 (1898).

B. When acting pursuant to its Constitutional Powers Over Interstate Commerce, the Federal Government has power to condemn State-owned land dedicated to a public use.

The power of the Federal Government to construct dams in aid of navigation is clear. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 326-330 (1936); *Arizona* v. *California*, 283 U. S. 423, 451-452 (1931); see *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 428 (1940).

The power of the Federal Government to condemn lands for dams in aid of navigation is also clear. *United States ex rel. T. V. A.* v. *Welch*, 327 U. S. 546, 553-555 (1946); *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508 (1941); see *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956); *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411 (1926); and *Monongahela Navigation Company* v. *United States*, 148 U. S. 312 (1893), where the United States' condemnation power was assumed.

The Federal Government may exercise its eminent domain powers without obtaining the consent of the State wherein the lands are located. *Chappell v. United States,* 160 U. S. 499, 510 (1896); *Luxton* v. *North River Bridge Co.,* 153 U. S. 525, 530 (1894); *Kohl* v. *United States,* 91 U. S. 367, 371, 374 (1876); *United States* v. *2902 Acres of Land,* 49 F. Supp. 595 (D. Wyo. 1943); *United States* v. *2715.98 Acres of Land,* 44 F. Supp. 683, 684 (W. D. Wash. 1942); see *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 147 (1937), as well as cases listed *infra,* p. 51. In the early leading case of *Kohl* v. *United States, supra,* it was stated:

> ". . . The powers vested by the Constitution in the General Government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories and arsenals, for navy yards and light-houses, for custom-houses, postoffices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, *or by the action of a State prohibiting a sale to the Federal Government, the constitutional grants of power may be rendered nugatory, and the Government is dependent for its practical existence upon the will of a State,* or even upon that of a private citizen. This cannot be. . . ." (Emphasis supplied.)

> ". . . If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. *The consent of a State can never be a condition precedent to its enjoyment. . . .*" (p. 374). (Emphasis supplied.)

The Federal Government may exercise its eminent domain power against state lands dedicated to a public

use, without the State's consent. *United States* v. *Carmack*, 329 U. S. 230 (1946); *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508 (1941); *United States* v. *Wayne County*, 53 Ct. Cl. 417, 252 U. S. 574 (1920); *United States* v. *State of South Dakota*, 212 F. 2d 14 (8th Cir. 1954); *United States* v. *State of Montana*, 134 F. 2d 194 (9th Cir. 1943), *cert. denied*, 319 U. S. 772; *State of Minnesota* v. *United States*, 125 F. 2d 636 (8th Cir. 1942); *Missouri* v. *Union Elec. Lt. & Power Co.*, 42 F. 2d 692 (C. D. Mo. 1930); *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (S. D. Ill. 1957); *United States* v. *.8677 Acre of Land in Richland County*, 42 F. Supp. 91 (E.D. S. C. 1941); *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372 (D. Md. 1939); *United States* v. *City of Tiffin*, 190 F. 279, 281 (C. C. N. D. Ohio 1911); *cf. United States* v. *Gettysburg Elec. R. Co.*, 160 U. S. 668 (1896); *United States* v. *Sixty Acres, More or Less of Land*, 28 F. Supp. 368 (E. D. Ill. 1939); *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 19-21 (C.C.D.N.J. 1887). In *Oklahoma ex. rel. Phillips* v. *Guy F. Atkinson Co., supra*, the State of Oklahoma sought to enjoin condemnation suits brought by the United States for the construction of the Dennison Dam on the Red River. The proposed reservoir would inundate 100,000 acres of land in Oklahoma, including 3,800 acres of state-owned land used for school purposes, a prison farm, highways, rights of way, and bridges, as well as obliterating the State boundary for 40 miles. This Court affirmed the dismissal of the State's suit, stating as follows:

> ". . . Since the construction of this dam and reservoir is a valid exercise by Congress of its commerce power, there is no interference with the sovereignty of the state. United States v.

> Appalachian Electric Power Co., supra (311 U. S. p. 428, ante, 263, 61 S. Ct. 291). The fact that land is owned by a state is no barrier to its condemnation by the United States. Wayne County v. United States, 53 Ct. Cl. (F) 417, affirmed in 252 U. S. 574, 64 L. ed. 723, 40 S. Ct. 394. There is no complaint that any property owner will not receive just compensation for the land taken. . . . Nor can a state call a halt to the exercise of the eminent domain power of the federal government because the subsequent flooding of the land taken will obliterate its boundary. And the suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the 'superior power' of Congress. . . ." (p. 534-535)

In the light of these well established principles, Tacoma can only be denied the right to take the state-owned fish hatchery in question, if Congress may not validly delegate such superior powers to a selected licensee.

C. Congress may grant federal powers to individuals, corporations, and municipalities to promote interstate commerce, in addition to, or in conflict with, their powers and capacity under State law.

1. In general.

The principle that Congress in the furtherance of interstate commerce may validly grant federal powers to selected agents irrespective of the agents' powers and duties under state law, was early established in American constitutional law. In *Gibbons* v. *Ogden*, 9 Wheat. 1 (U. S. 1824) this Court rejected any contention that Gibbons, authorized by federal license from Congress under the Act of February 18, 1793, to carry on the coasting trade, need comply with the laws

of New York as a condition precedent to engaging in interstate commerce within the State. In interpreting the act of Congress the Court held that it granted a federal right to the license holder to do that which the license permitted:

> "The word 'license' means permission or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license." (pp. 213-214).[1]

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[1] See *Sinnot* v. *Davenport*, 22 How. 227 (U. S. 1859), involving the same Act of 1793, where the Court struck down an Alabama vessel registration law as applied to vessels under federal license, on the ground that the state law imposed an additional requirement on a matter covered by Congress:

> ". . . Congress, therefore, has legislated on the very subject which the State act has undertaken to regulate, and has limited its regulation in the matter to a registry at the home port" (p. 242).

In *Mayor and Board of Aldermen* v. *McNeely*, 274 U. S. 676 (1927), a ferry owner, licensed solely under the laws of the United States, objected to the necessity of obtaining a local license. This Court ruled:

> ". . . The complainant, according to the record, has full capacity to operate, and is operating a serviceable ferry over the Mississippi and the town is attempting to exclude his ferry on the ground that he is operating it without a local license. The question is not whether the town may fix reasonable rates applicable to ferriage from its river front or may prescribe reasonable regulations calculated to secure safety and convenience in the conduct of the business, but whether it may make its consent and license a condition precedent to a right to engage therein. This we hold it may not do." (p. 683).

A recognized leading case on Congress' power to confer additional federal powers on state created corporations is Mr. Justice Bradley's decision while on circuit in *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9 (C.C.D.N.J. 1887).[1] This was a suit by the Attorney General of New Jersey to enjoin two companies, one a corporation of New York, and the other created by New Jersey, from erecting a bridge on state lands between New Jersey and Staten Island in New York, so authorized by an act of Congress. New Jersey contended that the Act merely gave the permission of Congress, leaving the companies to acquire state authority; that the New York corporation had no authority from New Jersey to exercise any corporate franchises therein, and that the New Jersey company could not act beyond its state charter. In rejecting these arguments, the court stated:

> "In our judgment, if congress itself has the power to construct a bridge across a navigable stream for the furtherance of commerce among the states, it may authorize the same to be done by agents, whether individuals, or a corporation created by itself, or a state corporation already existing and concerned in the enterprise. The objection that congress cannot confer powers on a state corporation is untenable. It has used their agency for carrying on its own purposes from an early period. It adopted as post-roads the turnpikes belonging to the various turnpike corporations of the country, as far back as such corporations were known, and subjected them to burdens, and accorded to them privileges, arising out of that re-

[1] Cited by this Court with approval in *United States* v. *Carmack*, 329 U.S. 230, 240 (1946); *United States* v. *Wayne County*, 252 U.S. 574 (1920), affirming 53 Ct. Cls. 417; *Luxton* v. *North River Bridge Co.*, 153 U.S. 525, 532 (1894); *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U.S. 641 (1890).

lation. It continued the same system with regard to canals and railroads, when these modes of transportation came into existence. Nearly half a century ago, it constituted every railroad built, or to be built, in the United States, a post-road. This, of course, involved duties, and conferred privileges and powers, not contained in their original charter. In 1866, congress authorized every steam-railroad company in the United States to carry passengers and goods on their way from one state to another, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination. The powers thus conferred were independent of the powers conferred by the charter of any railroad company. Surely these acts of congress cannot be condemned as unconstitutional exertions of power." (p. 15)

In analyzing the objection of lack of corporate capacity under state law, the court concluded that:

". . . we are brought back to the question of the power of congress to build the bridge, and whether that power is independent of the consent and concurrence of the state government. And, in our judgment, this question must be answered in the affirmative." (p. 16)[1]

Mr. Justice Bradley's reference to Congress' extensive employment of existing state corporations to carry

[1] The principles expressed in the *Stockton* case have been followed by state courts. In *People* v. *Hudson River Connecting Railroad Corp.*, 228 N. Y. 203, 126 N. E. 801, *cert. denied*, 254 U. S. 631 (1920), New York sought to halt the construction of a bridge across the Hudson by a New York corporation pursuant to an Act of Congress, by amending the corporation's charter and requiring approval by the New York state engineer. The New York Court of Appeals held that Congress had plenary power in the area, and that the federal charter was controlling.

out federal purposes and the endowment of such corporations with federal powers over and above those conferred by their state charters can be well documented. At the time of the *Stockton* decision there were over 150 federal statutes authorizing state created private or municipal corporations to construct bridges over navigable streams in the United States.[1]

The post roads act of July 24, 1866, had granted to state telegraph corporations a federal franchise in addition to that held by the corporation under state law. The federal right so conferred has been upheld by this Court against state legislation, restricting such corporate powers to a domestic corporation. *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 98 U.S. 1 (1878), and against state legislation applied so as to restrain a state-created corporation from exercising its federal rights, *Essex* v. *New England Telegraph Co.*, 239 U.S. 313 (1915).

With respect to railroads, Congress has both created federal corporations and has endowed state corporations with federal powers in order that they might carry out congressional purposes in the field of railroad transportation. *California* v. *Central Pacific R. Co.*, 127 U.S. 1, 39 (1888); see *Hooper* v. *California*, 155 U.S. 648, 652-653 (1895); *Central Pacific R. Co.* v. *California*, 162 U.S. 91, 123-124, 127 (1896); *Union Pacific R. Co.* v. *Myers*, (Pacific R.R. Removal Cases), 115 U.S. 1, 16, 18 (1885); *Ames* v. *Kansas*, 111 U.S. 449, 462 (1884); *United States* v. *Central Pacific R.R. Co.*, 99 U.S. 449, 450 (1879); *Central Pacific R.R. Co* v.

[1] See *Laws of the United States Related to the Construction of Bridges over the Navigable Waters of the United States* (War Department, 1887).

Gallatin, 99 U.S. 727, 729, 730 (1879). And in *Southern Pacific Railroad Company* v. *United States*, 183 U.S. 519, 527 (1902), Mr. Justice Brewer concluded for the Court:

> "... It is well settled that Congress has power to grant to a corporation created by a state additional franchises—at least franchises of a similar nature. ..."

The rationale of these cases has been recently followed by this Court in *Seaboard Air Line R. Co.* v. *Daniel*, 333 U. S. 118 (1948). There South Carolina objected to an order by the Interstate Commerce Commission under the Transportation Act which authorized Seaboard (a Virginia corporation) to own and operate a railroad system within South Carolina, without complying with the South Carolina corporation laws requiring such operation only by a state-created corporation. The Court held:

> ". . . Although the [Act] bars creation of a federal corporation, it clearly authorizes a railroad corporation to exercise the powers therein granted over and above those bestowed upon it by the state of its creation. These federally conferred powers can be exercised in the same manner as though they had been granted to a federally created corporation. See California v. Central P. R. Co., 127 U. S. 1, 38, 40-45. Here, just as a federally created railroad corporation could for federal purposes operate in South Carolina, so can this Virginia corporation exercise its federally granted power to operate in that State." (pp. 126-127).[1]

[1] The power of Congress to create a federal corporation and grant it rights and immunities irrespective of state law has been well established since *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819), and sustained many times. *Davis* v. *Elmira Savings Bank*, 161

2. Congress May Specifically Endow a State Corporation With Federal Eminent Domain Powers

The cases are clear that Congress has broad discretion to confer federal eminent domain powers on others. In *Berman* v. *Parker,* 348 U. S. 26 (1954), the Court upheld the grant of such powers to private corporations:

> "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. See *Luxton* v. *North River Bridge Co.,* 153 U. S. 525, 529, 530; *United States* v. *Gettysburg Electric R. Co.,* 160 U. S. 668, 679. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. . . . The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude . . ." (p. 33)

Congress may create a federal corporation and vest it with eminent domain powers, *Luxton* v. *North River Bridge Co.,* 153 U. S. 525 (1894), or delegate the right to a corporation created under state laws. *Cherokee Nation* v. *Southern Kansas R. Co.,* 135 U. S. 641, 656-

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U.S. 275 (1896); *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.,* 258 U.S. 549, 566 (1922); *New York ex rel. Rogers* v. *Graves,* 299 U.S. 401, 406 (1937); *Pittman* v. *Home Owners' Loan Corp.,* 308 U.S. 21, 32-33 (1939); *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U.S. 381, 389 (1939).

658 (1890);[1] *Thatcher* v. *Tennessee Gas Transmission Co.*, 180 F. 2d 644, 647-648 (5th Cir. 1950), *cert. denied*, 340 U. S. 829; *Tennessee Gas Transmission Co.* v. *Cleveland Trust Co.*, 120 N. E. 2d 137 (1953); *Tennessee Gas Transmission Co.* v. *Cleveland Trust Co.*, 120 N. E. 2d 143 (1953); *cf. Western Union* v. *Pennsylvania R.R. Co.*, 195 U. S. 540 (1904); *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 17-21 (C.C.D.N.J. 1887). The well-reasoned *Thatcher* case upheld Section 7 (h) of the Natural Gas Act, which paraphrases Section 21 of the Federal Power Act,[2] stating as follows:

> "There is no novelty in the proposition that Congress in furtherance of its power to regulate commerce may delegate the power of eminent domain to a corporation, which though a private one, is yet, because of the nature and utility of the business functions it discharges, a public utility, and consequently subject to regulation by the Sovereign. . . ." (p. 647)

In Nichols on Eminent Domain (3rd Ed.), Section 2.15, the matter is put as follows:

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[1] Federal eminent domain powers have been granted to railroad companies in a number of statutes: § 3 of Act of July 2, 1864, 13 Stat. 356, ch. 216 (Union Pacific R.R.); § 7 of Act of July 2, 1864, 13 Stat. 365, ch. 217 (Northern Pacific R.R.); § 7 of Act of July 27, 1866, 14 Stat. 292, ch. 278 (Atlantic and Pacific R.R.); *cf.* § 10 of Act of March 3, 1871, 16 Stat. 573, ch. 122 (Texas Pacific R.R.), power of eminent domain to be exercised in accordance with procedure established by state laws. In *United States* v. *Union Pacific Railroad Co.*, 353 U.S. 112 (1957), Mr. Justice Frankfurter, in his dissent, while commenting on the "liberality" of Congress in the railroad grant acts, notes "§ 3 of the 1864 amendment to the Act before us", which "gave the railroad power to take by eminent domain a two-hundred-foot right of way over privately owned land." (p. 132.) See also *Noble* v. *Oklahoma City*, 297 U.S. 481, 494 (1936).

[2] See p. 34, *supra*.

> "... *In such cases Congress may create its own instrumentalities or use those already existing, and it may give to a corporation organized under authority of a state power which the state did not give it and could not constitutionally have given it.*" (Emphasis supplied.)

Similarly, Congress may confer eminent domain powers on a municipality or other subdivision of a state, irrespective of its powers under state law. *Latinette* v. *City of St. Louis,* 201 F. 676 (7th Cir. 1912); *City of Davenport* v. *Three-Fifths of an Acre of Land,* 147 F. Supp. 794 (S. D. Ill. 1957); *Haeussler* v. *City of St. Louis,* 205 Mo. 656, 687-88, 103 S. W. 1034, 1042 (1907); see *Kline* v. *City of Louisville,* 224 Ky. 624, 6 S. W. 2d 1104 (1928).[1] In the *Latinette* case Congress had authorized the City of St. Louis to condemn land in Illinois for a bridge across the Mississippi River, but the City lacked eminent domain powers under Illinois law. The Court held:

> "... . that the nation had the right itself to build and maintain the bridge and approaches, and, for the purpose of acquiring land for the approaches, to exercise the power of eminent domain either directly or through a corporation created by it for that end, without the consent or over the objection of the state—are propositions too well settled to warrant elaboration or debate. Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; California v. Pacific R. Co., 127 U. S. 39, 8 Sup. Ct. 1073, 32 L. Ed. 150; Luxton v. North River Bridge Co., 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808; Wilson v. Shaw,

[1] Cf. *Stone* v. *Southern Illinois and Missouri Bridge Co.,* 206 U.S. 267 (1907), affirming 174 Mo. 1, 73 S.W. 453; and *Hagerla* v. *Mississippi River Power Co.,* 202 F. 776, 784-5 (S.D. Iowa 1913), which recognize the right of a state to endow a foreign corporation with the right of eminent domain even though the corporation does not have that power under its charter in the state of its creation.

204 U. S. 24, 27 Sup. Ct. 233, 51 L. Ed. 351. Contention is therefore narrowed to this: That Congress could not constitutionally select appellee as the agency through which a national power should be exercised. Nothing in the Constitution forbids the selection of a state corporation as a national agent. *In reason the material thing is the principal's authority, not the parentage or birthplace of the agent. . . .*" (pp. 678-79). (Emphasis supplied.)

In *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606 (M. D. Ala. 1922), the court, in an oft-cited opinion,[1] upheld the constitutionality of Section 21 of the Power Act:

". . . [Section 21] confers upon the agency of the United States, selected under the legislative authority, which agency is the licensee, the power and duty to act in reference to the navigation project both in its construction and in its maintenance. . . .

"Now it is clear that the government has the right to condemn private property for public use and the private right or use for or benefit is immaterial so far as the validity of the Act is concerned. It is settled that Congress can delegate the right of eminent domain to a federal agency selected pursuant to the congressional authority, an agency for carrying out its policy and principles in an administrative way in the development or improvement of navigation. . . ." (p. 616).

That Congress' duly selected agent must take state lands without the state's consent, is no bar to the power of Congress to delegate the right of eminent

[1] Cited with approval by this Court in *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n*, 328 U.S. 152 at 176 (1946).

domain to effectuate the federal purposes involved. *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 17-21 (C.C.D.N.J. 1887); *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (S. D. Ill. 1957); *Missouri* v. *Union Elec. Lt. & Power Co.*, 42 2d 692 (C.D. Mo. 1930); *cf.* cases cited *supra*, p. 51. *Missouri* v. *Union Elec. Lt. & Power Co.*, in upholding a condemnation action under Section 21 as against state-owned land devoted to a public use, stated:

> ". . . To deny the right of eminent domain as against this public property would not only defeat the functions of the national government but would run contrary to the obvious intent of the Congress as expressed in the Water Power Act." (p. 698)

D. Section 21 is a valid exercise by Congress of its power under the commerce clause to regulate the use of navigable streams by states and municipalities.

While the court below found no specific condemnation "power or capacity" in Tacoma under state law for the taking of the hatchery, it in no way indicated that Tacoma lacked general power or capacity under state law to engage in the power business and to accept a federal license under the Federal Power Act as held in *State of Wash. Dept. of Game* v. *Federal Power Com'n.*, 207 F. 2d 391 (9th Cir. 1953), *cert. denied*, 347 U. S. 936 (1954). To the contrary, its rulings in Tacoma's favor on questions other than the issue of condemnation (R. 370-371) show approval of its earlier holding in the ruling on demurrer that:

> "The Federal Power Act defines the term municipal corporation and authorizes the power commission to issue a license to such an entity. Ap-

> pellant has complied with the state law with respect to the right of a municipality to engage in the business of developing, transmitting and distributing power. Having been granted a license by the power commission, we hold that appellant is at the present time in the same position as any other licensee under the act. . . ." (R. 91)

Hence, the State of Washington has authorized its municipalities to engage in the power business and acquire federal licenses under the Federal Power Act.[1] Having so subjected its "creatures" to federal regulatory control, may the State thereafter preclude applicability of particular incidents thereof, *i.e.*, Section 21? Decisions of this Court indicate not.

In *California* v. *Taylor*, 353 U. S. 553, 568 (1957), following *United States* v. *California*, 297 U.S. 175 (1936), this Court held that where the State of California had permitted the "State Belt Railroad", owned and operated by the State, to engage in interstate commerce, it thereafter became subject to the control of Congress under the Railway Labor Act, regulating labor relation matters, regardless of the contrary requirements of the State Civil Service laws:

> "Finally, the State suggests that Congress has no Constitutional power to interfere with the 'sovereign right' of a State to control its employment relationships on a state-owned railroad engaged in interstate commerce. In United States v. California (US) supra, this Court said that the State although acting in its sovereign capacity in operating this Belt Railroad, necessarily so acted

[1] At present, ten licenses for major hydroelectric projects are held by municipalities and public utility districts of the State of Washington. *Federal Power Commission Thirty-Seventh Annual Report*, Fiscal Year 1957, p. 95.

'in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government'. 297 U.S., at 184. *'California, by engaging in interstate commerce by rail, has subjected itself to the commerce power,* and is liable for a violation of the Safety Appliance Act, as are other carriers. . . .' Id. 297 U.S., at 185. That principle is no less applicable here. *If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships. . . .*" (Emphasis supplied.)

When thus subject to the commerce clause, it is clear that charter or corporate limitations under state law are no bar to compliance with federal requirements. *Texas* v. *United States,* 292 U. S. 522, 535 (1934); *Colorado* v. *United States,* 271 U. S. 153, 165-166 (1926); *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 27 (1932); *New York* v. *United States,* 257 U. S. 591, 601 (1922); *Northern Securities Co.* v. *United States,* 193 U. S. 197, 350 (1904); *cf. Schwabacher* v. *United States,* 334 U. S. 182, 198 (1948); *Northwestern Electric Co.* v. *Federal Power Com'n.,* 321 U. S. 119 (1944); *Sanitary District of Chicago* v. *United States,* 266 U. S. 405, 426 (1925); *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229, 261, 262 (1911). In *Colorado* v. *United States,* Colorado sought to enjoin the Interstate Commerce Commission from ordering the abandonment of a branch line in Colorado of a Colorado corporation, constructed and acquired solely under state authority. Mr. Justice Brandeis, speaking for the Court, rejected the State's contention:

". . . The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the state is subordinate to the performance by it of its Federal duty, also assumed, efficiently to render transportation services in interstate commerce. . . . *But even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce.* New York v. United States, 257 U.S. 591, 601. Because the same instrumentality serves both, Congress has power to assume not only some control but paramount control in so far as interstate commerce is involved . . . . The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. *The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission.*" (pp. 165-166) (Emphasis supplied.)[1]

The Federal Water Power Act of 1920 embodied a "complete scheme of national regulation" designed to "promote the comprehensive development of the water resources of the Nation."[2] Section 21 thereunder authorizes the taking of lands for an improvement "*which in the judgment of the commission* is desirable and justified in the public interest for the purpose of

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[1] In *United States ex rel. Chapman* v. *Federal Power Com'n*, 345 U.S. 153, 168 (1953), this Court noted that the functions and powers of the Federal Power Commission are "comparable to those of the Interstate Commerce Commission in the field of transportation."

[2] *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n*, 328 U.S. 152, 180 (1946).

improving or developing a waterway or waterways for the use or benefit of interstate commerce." (Emphasis supplied.) Since the State of Washington has permitted its municipalities to acquire licenses under the Act and receive the benefits thereof, it has subjected itself to the federal plan of control, the incidents of which may not be vetoed by the assertion of any lack of *state* power or capacity in the federal licensee.

III. THE COURT BELOW ERRED IN NOT RECOGNIZING THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS AS FINAL ON THE QUESTION OF THE CITY'S CAPACITY TO ACCEPT THE FEDERAL LICENSE AND TO TAKE ALL LANDS NECESSARY FOR THE CONSTRUCTION OF THE PROJECT THEREUNDER

A. Finality of review under Sec. 313(b) of the Federal Power Act.

The proceedings in the Ninth Circuit, discussed *infra,* were under section 313 (b) of the Federal Power Act. That section (16 U. S. C. § 825*l* (b)) provides:

> ". . . The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, *shall be final,* subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28." (Emphasis supplied.)

Section 313(b) provides "a new and specific and complete remedy fully covering the subject matter" which is "exclusive." *Safe Harbor Water Power Corp.* v. *Federal Power Com'n.,* 124 F. 2d 800, 804 (3d Cir. 1941), *cert. denied,* 316 U.S. 663 (1942). There can be no doubt that Congress, apart from constitutional requirements, may determine "[w]hen judicial review is available and under what circumstances." *National*

Labor Relations Bd. v. *Cheney California Lumber Co.*, 327 U.S. 385, 388 (1946). When Congress has thus set forth a definite and special scheme of review, it may not be circumvented by resort to other forms of judicial review or determination de novo of the merits of the controversy. See, *e.g.*, *Myers* v. *Bethlehem Shipbldg. Corp.*, 303 U. S. 41, 48-50 (1938); *United States* v. *Corrick*, 298 U. S. 435 (1936); *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235 (D.C. Cir. 1941), *aff'd by equally divided Court*, 319 U. S. 732 (1943). The logic of these cases would a fortiori bar a collateral attack upon the license in the State courts.

B. Proceedings before the Ninth Circuit Court of Appeals.

1. *Identity of parties: The State was a party to the judgment of the Ninth Circuit Court of Appeals.*

It is clear that the "State of Washington, a Sovereign State", was a party to the final judgment below (R. 372), whether or not it was a party to the judgment in Tacoma's favor on demurrer (R. 64).[1]

It is also clear that the State of Washington was a party to the proceedings on Tacoma's license application before the Federal Power Commission and the

[1] The majority of the Washington Supreme Court below, while conceding that the State was a party to the Ninth Circuit case (R. 268), ruled (R. 278) that the State, as a "Sovereign State", was not a party to the first decision by the Washington Supreme Court (43 Wn. 2d 468, 262 P. 2d 214 (1953), R. 65). We think this ruling erroneous for the reasons stated in the dissenting opinion (R. 296-299). In any event, the res judicata issue with respect to the Ninth Circuit judgment seems so clear as to make it unnecessary to argue that the State's present contention was precluded also by the State court's judgment on demurrer (R. 64).

Ninth Circuit Court of Appeals. The court below so held (R. 269).

2. *Identity of issues: The inundation of the state-owned fish hatchery by Mayfield Dam, proposed to be constructed under the license, was known and specifically asserted as a defense by the Directors and State during the proceedings before the Federal Power Commission, and was asserted in general in their appeal to the Ninth Circuit and on certiorari to this Court.*

The respondent State and Directors' Petition of Intervention before the Federal Power Commission opposed the granting of the license, specifically alleging in paragraph nine:

> "That the reservoirs which would be created by the proposed dams would inundate a valuable and irreplacable fish hatchery owned by the State of Washington, as well as much productive spawning areas" (R. 292).

Thereafter at the hearing before a Commission Examiner, the interveners presented the testimony of Robert Meigs, Assistant Chief of the Fish Management Division for the Washington State Department of Game, as follows (R. 293):

> "Q. Now, does the State of Washington Game Department have a hatchery on the Cowlitz watershed?
>
> "A. Yes, we have what we refer to as the Mossyrock Hatchery, which is located a short distance from Mossyrock, Washington [Ninth Circuit Court of Appeals record, p. 3348].
>
> "Q. Is it within the area that would be inundated by these dams?
>
> "A. According to information furnished us by Tacoma, the flood line from the Mayfield reservoir

would extend some 400 feet past the hatchery and would flood it out.

"Mr. Mason: You mean 400 feet vertically or horizontally?

"The Witness: That I don't recall. I don't think vertically; horizontally."

The Commission in its opinion overruling the objections of the interveners noted that:

> ". . . As a complement to the other fish protection measures, both as related to upstream migrations, the City proposes to construct and operate extensive fish hatchery facilities for artificial propagation of the fish and development of fingerlings capable of making the migrations to the sea." (R. 24)

The Commission ordered the City, as a condition to proceeding under the license, to construct fish handling facilities estimated to cost $9,465,000 (Finding (47), R. 38), as follows:

> "*Article 31.* The Licensee shall construct, maintain and operate such fish ladders, fish traps or other fish handling facilities or fish protective devices and make such stream improvements and provide such fish hatcheries and similar facilities and comply with such reasonable modifications of the project structures and operation in the interest of fish as may be prescribed hereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior." (R. 46)

The license issued by the Commission to the City expressly described and authorized the Mayfield development:

> ". . . to have a maximum height of about 240 feet above bedrock and a length of about 850 feet

> at its crest; a reservoir extending approximately 13.5 miles upstream to the Mossyrock dam with an area of about 2,200 acres with normal water surface at elevation 425 feet. . . ." (Finding 63 (b), R. 41)

Hence, it was clear that the license issued to the City by the Commission, over the State's objections, would inundate portions of the existing State fish hatchery, and that Tacoma would be required to build new hatcheries. The Commission further expressly found:

> "(53) The Applicant is a municipal corporation; it has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project; and it is a municipality within the meaning of Section 3(7) of the Act." (R. 39)

In their appeal from the Commission's Order to the Ninth Circuit Court of Appeals, the State and Directors, while they made no express mention of the proposed inundation of the State-owned hatchery, did assign as a "Specification of Error" that:

> "The Orders of the Commission of November 28, 1951, and January 24, 1952, deprive Petitioners of their property and property rights without due process of law and are in contravention of the Constitution of the United States." (Opening Brief for Petitioners, p. 17.)[1]

And at pages 65-67 of their brief contended as follows:

> "We have previously shown that the ownership of the fish within the waters of the State is in the people of the State. Likewise, the beds and banks

[1] The Commission's Order issuing the license was dated November 28, 1951 (R. 27); its Order denying rehearing dated January 24, 1952 (R. 49).

of the Cowlitz River, including the spawning beds of the salmon within the river and its tributaries, are the property of the State. *First Iowa Case, supra, United States* v. *Cress,* 243 U. S. 316, 61 L. Ed. 746.

". . . Contrary to the express mandate of the people of the State of Washington, acting through their legislature, the City of Tacoma, acting under purported license of the Federal Power Commission, intends to proceed toward the destruction of the Cowlitz fishery and to take for its own use the property of the State. . . .

"The *Federal Power Act,* therefore, would be contrary to the Fifth Amendment if the Court should conclude that it authorized the City of Tacoma to destroy and take the property of the people of the State of Washington in derogation of the laws of the State and without compensation therefor.

* * *

"Aside from what rights Section 21 (providing for condemnation) provides in respect of the intent of Congress, it specifically accords to a licensee the right of condemnation. *Respondent has not shown, nor could it show, that the City of Tacoma has availed itself of that right or acquired by condemnation any right to take or destroy the property of the State of Washington* and its people. In and of itself *this constitutes a complete bar* to the right of the City of Tacoma to proceed further in the construction of these dams under any license of the Federal Power Commission." (Emphasis supplied.)

Hence, the appealing State and Directors presented as one general issue the effect of constructing the licensed dams upon State property used for the protection and propagation of fish, and the availability to Tacoma of the power of condemnation thereof under

Section 21 of the Federal Power Act. If they did not choose to specify in detail the tracts of land they were talking about, as they had before the Commission, but to include them all under the caption "property", that was their privilege, but it did not affect the finality of the review they sought.

The Ninth Circuit ruled on the general issue as posed by the appealing Directors and State:

> "As we see it, it is not within our jurisdiction to prescribe a policy. The Federal Government has the jurisdiction over navigable rivers and it is within the power of the Congress and the Executive to prescribe the policy in relation thereto. If the dams will destroy the fish industry of the river, we are powerless to prevent it." (*State of Wash. Dept. of Game* v. *Federal Power Com'n.*, 207 F. 2d 391, 398 (9th Cir. 1953), *cert. denied*, 347 U. S. 936 (1954), Appendix D, pp. 123a-124a.)

The Ninth Circuit affirmed the Commission's order, expressly reciting the Commission's finding that:

> "Tacoma is a municipality within the meaning of Section 3 (7) of the Act and has submitted satisfactory evidence of compliance with the requirements of all applicable state laws 'insofar as necessary to effect the purposes of a license for the project' . . ." (207 F. 2d at 394; Appendix D, p. 117a).

Thereafter, the State and Directors raised the same general issue in their petition for a writ of certiorari to this Court, wherein they stated:

> ". . . Contrary to the express mandate of the people of the State of Washington, acting through their legislature, the City of Tacoma, acting under purported license of the Federal Power Commission, intends to proceed toward the destruction of

the Cowlitz fishery and to *take for its own use the property of the state. . . .*

"The Federal Power Act, therefore, would be contrary to the Fifth Amendment if the court should conclude that it authorized the City of Tacoma to destroy and take the property of the people of the State of Washington in derogation of the laws of the state and without compensation therefor." (pp. 31-32) (Emphasis supplied.)

This Court denied certiorari: 347 U. S. 936 (1954) (Appendix D, p. 125a).[1]

We say that the issue here involved, *i.e.*, whether the licensee may build this project, notwithstanding its inclusion of State property which must be condemned under Section 21, was, in fact, litigated before the Federal Power Commission, was decided there, and the decision was affirmed by the Ninth Circuit. But, whether or not the State's title to this specific property was included in the broader property issue which the State raised in the Ninth Circuit and on certiorari, it is clear that it could have been specifically raised there, as it was before the Commission itself (R. 292),

---

[1] In *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 443 (1955), this Court referred in a footnote to the case of *State of Washington Dept. of Game* v. *Federal Power Com'n.*, 207 F. 2d 391 (9th Cir. 1954), as follows:

"9. In what is somewhat of a companion case to the one before us, the Court of Appeals for the Ninth Circuit has recognized that, despite contentions as to state control of the use of water and the conservancy of fish within the Columbia River Basin, the Federal Power Commission has the authority to make effective a license and to provide facilities for anadromous fish much as is here proposed, when the waters involved are navigable waters of the United States. Washington Dept. of Game v. Federal Power Com. (CA9th) 207 F2d 391. We denied certiorari April 5, 1954. 347 US 936, 98 L ed 1087, 74 S Ct 626."

and the finality prescribed by Section 313(b) precludes the State's subsequent litigation of it.

3. *The Ninth Circuit decision did not exclude this issue by its dictum relating to corporate powers.*

The majority of the Supreme Court of Washington below ruled that the decision of the Ninth Circuit Court of Appeals was not res judicata of the question of the City's capacity to condemn the fish hatchery lands in question, because of its interpretation of a dictum in that court's decision, allegedly excluding such questions from the scope thereof. That dictum, and its preceding context, are as follows:

> "The objectors further contend that Tacoma, as a creature of the State of Washington, cannot act in opposition to the policy of the State or in derogation of its laws.
>
> "Again, we turn to the First Iowa case, supra. There too, the applicant for a federal license was a creature of the state and the chief opposition came from the state itself. Yet, the Supreme Court permitted the applicant to act inconsistently with the declared policy of its creator, and to prevail in obtaining a license.
>
> "Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States. *However,* we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the

plan, but the Commission has no power to adjudicate them." (207 F. 2d 391, 396; Appendix D, pp. 120-121a; emphasis supplied.)

Viewed in context, the Ninth Circuit decision holds that a municipality, although a creature of the State, may act under a Federal Power Commission license in derogation of state laws which would veto construction of the project as such, but says, *obiter*, that a municipality may be bound by state laws bearing not upon the construction of the project as such, but bearing, for example, upon the municipality's power to borrow money. The Court's touchstone as to whether state law does or does not govern the activities of the municipality depends on the nature of the question involved. If it relates to the power of the licensee to "build a dam", *i.e.*, those matters expressly covered by Congress under the terms of the Federal Power Act, it falls within the federal orbit and must be presented in the federal proceedings; while if pertaining to visitatorial powers over corporations, or "indebtedness limitations", *i.e.*, those matters which do not relate to the federal power over navigable waters, state law would guide. Based on this test, the Washington Supreme Court below clearly misinterpreted the Ninth Circuit in concluding that the power of the City as licensee to condemn land *necessary for the construction of the project*, a matter expressly covered in the Federal Power Act,[1] is governed by state law, and may be relitigated in the state courts after the Commission and the federal court have authorized construction of a project defined by the Commission as including state-owned lands within its boundaries.

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[1] Section 21, 16 U. S. C. § 814.

C. The decision below, in failing to give finality to proceedings before the Federal Power Commission, affirmed by a Circuit Court of Appeals, conflicts with the opinion of this Court in First Iowa Hydro-Elec. Coop. v. Federal Power Com'n., 328 U. S. 152 (1946).

In the *First Iowa* case, the State of Iowa intervened in the license application proceedings before the Federal Power Commission to contest the issuance of a federal license to a state cooperative association, on the ground that the applicant had not complied with certain state laws controlling the type of project that could be built and requiring a state permit therefor. The State contended that the Coop.'s failure to comply violated § 9 (b).[1] The Commission suspended proceedings on the ground that the state law issue presented was for judicial determination. This Court reversed the Commission, stating:

> "We believe that the Commission would have been justified in proceeding further at that time with its consideration of the petitioner's application upon all the material facts. Such consideration would have included evidence submitted by the petitioner pursuant to § 9 (b) of the Federal Power Act as to the petitioner's compliance with the requirements of the laws of Iowa *with respect to the petitioner's property rights to make its pro-*

[1] Section 9 (b) of the Federal Power Act provides:

> "That each applicant for a license hereunder shall submit to the Commission—
>
> • • •
>
> "(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act."

posed use of the affected river beds and banks and to divert and use river water for the proposed power purposes, as well as the petitioner's right, within the State of Iowa, to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of the license. . . . (pp. 160-161). (Emphasis supplied.)

* * *

And, at p. 182:

"It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others."

Mr. Justice Frankfurter, who dissented, nevertheless said:

"To safeguard the interests of the States thus protected by § 9 (b), Congress has directed that notice be given to the State when an application has been filed for a license, the granting of which may especially affect a State. Section 4 (f), 49 Stat. 838, 841, c. 687, 16 U.S.C.A. § 797 (f), 5 F. C. A. title 16, § 797 (f). *If a State does not challenge the claim of an applicant, the evidence submitted by the applicant, if found to be satisfactory by the Commission, has met the demands of § 9 (b), and a State cannot thereafter* challenge the Commission's determination. . . ." (pp. 184-185; emphasis supplied).

In our case, the Commission did proceed to make the determination of the applicability of state law which this Court said the Commission should have made in the *First Iowa* case, and the Ninth Circuit Court of Appeals affirmed under Section 313(b).

The effectiveness of the review proceedings which Congress called "final" in Section 313 (b) is at stake here, if disappointed contestants may relitigate in the state courts the licensee's capacity under state law to accept and execute the powers conferred upon such licensees by the federal law under attack. *Harris* v. *Central Nebraska Public Power & Irr. Dist.*, 29 F. Supp. 425 (D. Neb. 1938); *cf. Venner* v. *Michigan Central Railroad Co.*, 271 U. S. 127, 128 (1926).[1] Review under this statute is the exclusive remedy, and the State exhausted that remedy when this Court denied certiorari in the Ninth Circuit case.

---

[1] In the *Harris* case, the Central Nebraska Public Power & Irrigation District, a public agency of the State of Nebraska, sought to condemn lands under Section 21 of the Power Act under the license held by it from the Federal Power Commission. The property owners defended on the ground that Section 21 could not confer a right of eminent domain on the District. The court, after noting that Section 21 powers were an integral part of the license, held:

> "This is a collateral attack on an order of the Federal Power Commission. The Federal Power Act, among other provisions, affords ample opportunity for every interested party to be heard before the Commission before the license is issued. By Section 313(a), 16 U.S.C.A. § 825l, any person aggrieved by an order issued by the Commission in a proceeding under the Act may appear and become a party by intervention, and apply for a re-hearing within thirty days after the issuance of such an order, and may obtain a review in the Circuit Court of Appeals of the United States for any Circuit wherein the licensee is located by filing, within sixty days after the order upon the application for rehearing, a petition praying that the order may be modified or set aside in whole or in part. Such proceedings were disregarded by the land owner in this case. We think they had an opportunity to be heard on the issue which they now raise, but of which they did not avail themselves." (p. 428)

CONCLUSION

The decision below presents the paradox of a holding, on the one hand, that state statutes specifically prohibiting construction of this project are invalid because they would impose a veto upon an authorization lawfully made by the United States (R. 370), and a holding, on the other hand, that an effective veto may be imposed on the same project by mere silence of the legislature (R. 286). This result was reached even though Congress has spoken upon the same subject by authorizing its licensees to exercise the federal power of eminent domain necessary to the construction of such projects. Delegation of the federal power of eminent domain, free of state interference, is, as Congress foresaw and intended, and as this case demonstrates, a necessary ingredient of the licensing system established by the Federal Power Act. That act being constitutional, so is this essential feature of the federal control of the comprehensive development of navigable streams.

The judgment below, insofar as it is adverse to the Petitioner, should be reversed.

Respectfully submitted,

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APPENDIX A

Extracts from the Federal Power Act

(Act of June 10, 1920, as amended, 41 Stat. 1063, 16 U. S. C., *et seq.*)

Section 3 (7) (16 U. S. C. § 796 (7)) and Section 3 (9) (16 U. S. C. § 796 (9)).

The words defined in this section shall have the following meaning:

• • •

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

• • •

(9) "municipal purposes" means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality. . . .

Section 4 (e) (16 U. S. C. § 797(e)).

The commission is hereby authorized and empowered—

• • •

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public

lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission, and shall become a part of the records of the Commission: *Provided further,* That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * *

Section 7 (a) (16 U. S. C. § 800(a)).

(a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

Section 9 (b) (16 U. S. C. § 802(b)).

That each applicant for a license hereunder shall submit to the commission—

* * *

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

Section 21 (16 U. S. C. § 814).

When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir,

diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Section 23 (16 U. S. C. § 817).

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before

such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

Section 27 (16 U. S. C, § 821).

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Section 313 (b) (16 U. S. C. § 825 l (b)).

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Com-

mission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 509

THE CITY OF TACOMA, A MUNICIPAL CORPORATION,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, AND ROBERT SCHOETTLER, AS DIRECTOR OF FISHERIES, AND JOHN A. BIGGS, AS DIRECTOR OF GAME, OF THE STATE OF WASHINGTON, AND THE STATE OF WASHINGTON, A SOVEREIGN STATE, *Respondents.*

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Condemnation Act of August 1, 1888, 40 U.S.C. § 257 9

Public Building Act of May 25, 1926, 40 U.S.C. § 341 9

Statutes of State of Washington:

Laws 1949, ch. 9, RCW 75.20.010, *et seq.* 12
Senate Bill 264 16-17
Substitute Senate Bill 264 16-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 509

THE CITY OF TACOMA, A MUNICIPAL CORPORATION,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, AND ROBERT SCHOETTLER, AS DIRECTOR OF FISHERIES, AND JOHN A. BIGGS, AS DIRECTOR OF GAME, OF THE STATE OF WASHINGTON, AND THE STATE OF WASHINGTON, A SOVEREIGN STATE, *Respondents.*

REPLY BRIEF OF PETITIONER

ARGUMENT

I. The Respondents' contention that the case is moot is without substance.

The facts and law are clear.

On November 23, 1953, the petitioner filed a request with the Federal Power Commission for extension of the time under Article 28 for commencement of construction (R. 161-163). The Commission, after noting

that the delay was caused by the appeal to the Ninth Circuit Court of Appeals and the subsequent seeking of review in the United States Supreme Court by the respondent Directors, expressly found that the ". . . requested extension of time is not incompatible with the public interest," and ordered the ". . . time for commencement of construction of Project No. 2016 . . . extended to December 31, 1955, four years from the effective date of the license." (R. 159-160) Project No. 2016 was commenced by the petitioner prior to December 31, 1955, by beginning construction of the Mayfield Dam (R. 253). Thereafter, injunctions obtained by respondents have closely restricted petitioner's construction efforts (R. 129, R. 137-8, R. 202, R. 267, R. 377).

The respondents' contention that the case is moot because construction cannot be completed prior to "June 23, 1958", must be rejected for three separate reasons:

First, Article 28 of the license in providing that the licensee "shall complete the project works in 36 months" obviously refers to the date set by the first phrase of Article 28 for commencement of the project, which the Commission's Order (R. 159-160) "extended to December 31, 1955." Therefore, December 31, 1958, not June 23, 1958, is the present completion date.

Second, irrespective of the date, the Act expressly provides that:

> ". . . the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests . . ." (Section 13, 16 U.S.C. § 806)

The Commission now has pending before it an application filed by petitioner for an extension of time in which to complete construction of the Project. Hence, the case can only be considered moot upon the speculation that the Commission, which has previously found that delay caused by legal proceedings by respondents warranted an extension of time, will deny the present application. This Court will not engage in such speculations.

Third, even assuming the Commission could not extend the time for completion, the respondents lack standing to raise this objection here. Congress has specified that a license may be revoked only by the Attorney General in district court proceedings upon the request of the Commission:

> ". . . In case the construction of the project works, or of any specified part thereof, have been begun but not completed within the time prescribed in the license, or as extended by the commission, *then the Attorney General*, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 26 of this act." (Section 13, 16 U.S.C. § 806) (Emphasis supplied.)

Hence it is the Attorney General, and not respondents, who alone has standing to revoke an outstanding license, and he has initiated no such proceedings, nor could he do so upon the present record.

II. Section 21 may not properly be interpreted as a mere venue statute.

The respondent taxpayers (not joined by respondent State and Directors) pose the unique argument that Section 21 grants licensees no federal right of eminent domain, but merely confers a right of venue in the federal courts for the exercise of powers conferred by the State. We characterize this as "unique", for as far as we can find this is the first time such an interpretation has ever been suggested. This Court, in the four instances it has referred to Section 21, has characterized it as a federal grant of eminent domain powers:

(a) *Ford & Son* v. *Little Falls Fibre Co.*, 280 U.S. 369, 378, 379 (1930):

> ". . . *By § 21, licensees are given the power of eminent domain and authorized to conduct condemnation proceedings* in district or state courts . . ."
>
> ". . . Whether § 21, *giving to licensees the power of eminent domain,* confers on them power to condemn rights such as those of respondents, . . ." (Emphasis supplied)

(b) *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, 328 U.S. 152, 180-81 (1946):

> "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.[25] . . ."

In footnote 25, the Court lists:

> ". . . § 21, *federal powers of condemnation vested in licensee . . .*" (Emphasis supplied.)

(c) *Grand River Dam Authority* v. *Grand Hydro*, 335 U.S. 359, 373 (1948):

> ". . . The petitioner, likewise, is not seeking to enforce *such rights as it might have to condemn this land by virtue of its federal license.*[9] Accordingly, we express no opinion upon what would be the appropriate measure of value in a condemnation action brought by the United States *or by one of its licensees in reliance upon rights derived under the Federal Power Act.*" (Emphasis supplied)

In footnote 9, the Court cites Section 21 of the Act.

(d) *Federal Power Com'n.* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 255 (1954):

> "After quoting from §§ 10 (c) (liability for damages caused by the licensed project), 27 (saving clause as to proprietary rights under state law), *21 (condemnation rights)* and . . ." (Emphasis supplied.)

Other federal cases similarly interpreting Section 21 and the parallel Section 7 (h) of the Natural Gas Act as a grant of federal eminent domain powers, cited by petitioner at pages 33-34 of its brief, are likewise overlooked or inadequately stated by respondents. For instance *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606 (M. D. Ala. 1922) (quoted at p. 61 of petitioner's brief), directly holds that Section 21 confers a federal right of eminent domain upon licensees for the construction of authorized projects designed to develop or improve navigation. And in *Oakland Club* v. *South Carolina Public Service Authority*, 110 F. 2d 84 (4th Cir. 1940), the court said at page 86, with respect to Section 21:

". . . We think, under this Act, that the condemnor has an election *to exercise the power of eminent domain either under the specified enumerations of the Federal Power Act or* under the broader provisions of the Eminent Domain Act of the State of South Carolina." (Emphasis supplied)

In *Thatcher* v. *Tennessee Gas Transmission Co.*, 180 F. 2d 644, 647 (5th Cir. 1950), *cert. denied*, 340 U.S. 829, involving language in Section 7 (h) of the Natural Gas Act, identical with that stressed by respondent in Section 21 of the Federal Power Act, the court held:

". . . Consideration of the facts, and the legislative history, plan and scope of the Natural Gas Act, and the judicial consideration and application the Act has received, leaves us in no doubt *that the grant by Congress of the power of eminent domain to a natural gas company, within the terms of the Act*, and which in all of its operations is subject to the conditions and restrictions of the statute, is clearly within the constitutional power of Congress to regulate interstate Commerce. Indeed when Congress determined it in the public interest to regulate the interstate transportation and interstate sale of natural gas as provided by the Act of 1938 and the amendment of 1942, so that companies engaged in such business not only could not operate except under the authority provided by the statute, but could also be required to provide additions and extension of service, it was proper to make provision whereby the full statutory scheme of control and regulation could be made effective, *by the grant to such company of the right of eminent domain.* The possession of this right could well be considered necessary to insure ability to comply with the Commission requirements as well

> as with all phases of the statutory scheme of regulation." (Emphasis supplied)

The legislative history of Section 7 (h) (added to the Natural Gas Act by special amendment in 1947) equating it to Section 21 is noted at page 34 of petitioner's brief.

An analysis of other sections of the Act also reveals that Congress rejected any necessity that licensees possess a condemnation power or capacity under state law duplicating the delegated federal right. In Section 3 (9), defining terms, Congress had available the very language which the respondents and the court below would now read into Section 21. There Congress defined "municipal purposes" to mean and include:

> ". . . all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;"

However, "municipal purposes" is used only once in the Act—in Section 10 (e),[1] exempting municipalities from annual charges. Even here the phrase is so used by Congress to indicate that municipalities may in some instances act beyond the scope of "municipal purposes" where navigation is involved.[2]

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[1] 16 U.S.C.A. § 803 (e).

[2] Section 10 (e) reads in part:

> ". . . *Provided further.* That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or *municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation*, licenses therefor shall be issued without charge; . . ." (Emphasis supplied.)

That Congress knew how to specify the applicability of state law is further seen in Sections 19 and 20 of the Act. Congress here expressly provided for the state regulation and control of power rates, charges, and services by licensees in certain situations. See *Safe Harbor Water Power Corp.* v. *Federal Power Com'n.*, 124 F. 2d 800, 806 (3rd Cir. 1941), *cert. denied*, 316 U.S. 663 (1942). Compare also the language of Section 201 (f) in Part II, "Regulation of Electric Utility Companies Engaged in Interstate Commerce," which provides that Part II shall not include a state or any political subdivision of a state. All of the sections of the Act involved in the present litigation are in Part I, which makes no such exclusion. Such language is absent from the immediately following Section 21.

Furthermore, if Section 21 were purely a venue statute, it would not expressly authorize "the exercise of the right of eminent domain in the district court . . . *or in the State courts.*"

Apparently, this was also overlooked by respondent taxpayers with respect to their contention regarding the Eleventh Amendment (Taxpayer's brief, p. 17), for the authorization of state court suits disposes of any possible claim that the Act is inoperative under that amendment.[1] Certainly the State of Washington's voluntary intervention as a party defendant in the present litigation precludes any consideration of the Eleventh Amendment as a bar to the power of

[1] That the state courts are available to Tacoma for the condemnation of state-owned property is clear. *Tacoma* v. *State*, 121 Wash. 448, 209 Pac. 700 (1922). It was on this ground that Judge Boldt entered his memorandum opinion in the District Court action with respect to certain state highways. (*Tacoma* v. *Severns* R. 176-8)

Tacoma to take the hatchery now in issue. *California* v. *Taylor*, 353 U.S. 553, 568 (n. 16) (1957). In the *Taylor* case, the Court unanimously rejected an Eleventh Amendment contention made by California identical to that of present respondent taxpayers, as hypothetical:

> "16. The contention of the State that the Eleventh Amendment to the Constitution of the United States would bar an employee of the Belt Railroad from enforcing an award by the National Railroad Adjustment Board in a suit against the State in a United States District Court under § 3, First (p), of the Act is not before us under the facts of this case."

III. Section 21 authorizes the taking of State-owned lands where necessary for the construction of an authorized project licensed by the Commission.

The respondent State and Directors rationalize the unexplained and unsupported rejection by the court below of Section 21 by speculating that the state court "held in essence" that "the Federal Power Act does not specifically mention state-owned property". (Brief, p. 21.)

A similar contention was rejected in *United States* v. *Carmack*, 329 U.S. 230 (1946), upholding a taking of city land dedicated to a public use under the general Condemnation Act of August 1, 1888 (40 U.S.C. § 257) and the Public Building Act of May 25, 1926 (40 U.S.C. § 341). Neither act designated any particular land, but generally authorized the respective federal official to take "such sites and additions to sites as he may deem necessary"[1] or "whenever in his

[1] Section 1 of Public Buildings Act of May 25, 1926, 44 Stat. 630; 40 U.S.C. § 341.

opinion it is necessary or advantageous to the Government to do so."[2] The Court dismissed a contention that the Government lacked specific statutory authority to take the property, as follows:

> ". . . We find in the broad terms of the Public Buildings Act authority for the designated officials to select the site they did. We find, in both Acts, authority for them to acquire by condemnation the site thus lawfully selected. The judgment exercised by the designated officials in selecting this site out of 22 sites suggested, and out of two closely balanced alternatives, constituted an administrative and legislative decision not subject to judicial review on its merits. It was within the legislative power of Congress to choose or reject this site by direct action. It would have been within its legislative power to exclude from the consideration of its representatives this or other sites, the selection of which might interfere with local governmental functions. Such an exclusion would have been an act of legislative policy. We find no such express or necessarily implied exclusion in the broad language of these Acts." (pp. 242-243.)

Similarly, Section 21 of the Federal Power Act, while authorizing the final condemnation by licensees, carefully reserves the selection of the site and lands to be taken to the judgment of the Commission itself:

> "When any licensee cannot acquire . . . the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir . . . in conjunction with an improvement which *in the judgment of the commission is desirable and justified in the public interest for the pur-*

[2] Section 1 of Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. A. § 257.

pose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce. . . ." (16 U.S.C.A. § 814.) (Emphasis supplied.)

It was the Federal Power Commission that selected and authorized the Cowlitz dam sites and specified the reservoir areas to be covered by each, after a finding that the "project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce." (Federal Power Commission Order on Project No. 2016, 92 P.U.R. (n.s.) 79; Findings 2 (R. 28), 59 (R. 39), 63 (R. 40-44), Special Conditions 34 (R. 47), 35 (R. 47). Hence, the general authority given by Section 21 is ample for the taking.

Assuming *arguendo* the applicability here of the rule that express legislative authority is necessary for "donees" of sovereign eminent domain powers to take public property devoted to a public use,[1] the courts have concluded that such lands may be taken if "expressed or necessarily implied" by the act in question. See *United States* v. *Carmack*, 329 U.S. 230 (1946), footnote 13 at p. 243. Section 21 expressly authorizes the condemnation of lands "necessary to the construction, maintenance, or operation of any dam, reservoir," etc. Since the project licensed

[1] This is actually only a state rule restricting the right of public utilities, etc., having general eminent domain powers under State law from taking for their own benefit property in the State devoted to some public use. Such a rule seems hardly applicable to a donee of eminent domain powers granted by Congress in a valid federal statute. While federal courts have discussed the rule *obiter* as applicable to federal donees, no case has been found barring a federal donee as such from taking any state public lands in question.

by the Commission cannot be built without taking the fish hatchery lands in question, which are clearly "necessary to the construction" of the project, their taking is necessarily implied by Congress in Section 21. *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794, 799-801 (S.D. Ill. 1957); *Missouri ex rel. Camden County* v. *Union Electric Light and Power Co.*, 42 F. 2d 692, 698 (C.D. Mo. 1930); *cf. Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 17-19 (C.C.D.N.J. 1887); *United States* v. *Sixty Acres, etc.*, 28 F. Supp. 368, 373 (E.D. Ill. 1939).

In addition, the respondents fail to answer the authorities cited by petitioner at pp. 36-40 of its opening brief.

IV. The asserted "lack of capacity" on the part of Tacoma to exercise the federal right of eminent domain granted by Section 21 is but an arbitrary characterization devised in an attempt to circumvent the decision of this Court in the First Iowa and Pelton Dam cases.

The "lack of capacity" argument of respondents is not new to them. They have asserted the identical contention against Tacoma at each stage of the prior proceedings in this case in an effort to block development of the Cowlitz Project:

(a) *Before the Ninth Circuit Court of Appeals.* The respondent State and Directors strenuously argued that the state fish sanctuary act (Chapter 9, Laws of 1949) incapacitated the City from exercising its federal license.

> "The City of Tacoma as a Municipal Corporation Has No Rights Apart From the State of Washington, Nor in Derogation of State Laws, and Therefore the Said City Cannot Be Licensed by

the Federal Power Commission to Build These Dams." (Brief, pp. 68-74)

The argument was specifically rejected by the Ninth Circuit. *State of Wash. Dept. of Game* v. *Federal Power Com'n.*, 207 F. 2d 391, 396 (9th Cir. 1953):

> "Again, we turn to the First Iowa case, supra. There, too, the applicant for a federal license was a creature of the state and the chief opposition came from the state itself. Yet, the Supreme Court permitted the applicant to act inconsistently with the declared policy of its creator, and to prevail in obtaining a license."

(b) *Before this Court on Petition for Writ of Certiorari to the Ninth Circuit.* The respondent State and Directors contended that:

> ". . . The question to be determined is whether the Congress (if such power be invested in Congress) in the Federal Power Act conferred upon the Federal Power Commission authority to issue a license where the licensee is a municipality which has completely failed to comply with applicable state laws relative to the resources in question, and where the project itself is prohibited by state laws passed for the protection of the state's natural resources. . . ." (Petition for Writ of Certiorari, p. 18)

Certiorari was denied, 347 U.S. 936 (1954).

(c) *Before the Supreme Court of Washington: Decision on Demurrer.* The court noted the contention of respondents as follows:

> "It is vigorously asserted by respondents and cross-appellants that appellant, being a municipal corporation created by the state, may not defy the laws of its creator. In other words, assuming that

appellant ever had the power to construct dams on rivers resulting in the destruction of fish life, it is contended that the legislature has taken that right away with respect to the Cowlitz river by enacting the fish sanctuary act (Chap. 9, Laws of 1949)." (R. 89)

This argument was specifically rejected:

"The Federal Power Act defines the term municipal corporation and authorizes the power commission to issue a license to such an entity. Appellant has complied with the state law with respect to the right of a municipality to engage in the business of developing, transmitting and distributing power. Having been granted a license by the power commission, we hold that appellant is at the present time in the same position as any other licensee under the act." (R. 91)

The respondents' present argument found expression in the dissenting opinion on demurrer:

"In so far as chapter 9 is sought to be applied as an exercise of police power, it may or may not have been superseded by the Federal power act, a question we need not now decide. In so far as chapter 9 is sought to be applied as an exercise of the power of the state over subordinate units of government, it has not been superseded. The Federal government may not confer corporate powers upon local units of government, and the Federal power act does not purport to do so. . . ." (R. 92-3)

(d) *Before the Supreme Court of Washington: Decision on Merits.* Again the respondent State and Directors repeated their previous contention that the City of Tacoma, being but a creature of the State, lacked capacity to effectuate its license under state law, but shifted the inhibition from the express state statutory

bars previously rejected (*i.e.*, the fish sanctuary act, Chapter 9, Laws of 1949), to the situation where state law was silent. For the first time the argument was accepted, the new majority adopting in part the language of the earlier dissenting opinion on demurrer.

From a review of these prior proceedings, it is clear that the respondents have indiscriminately and erroneously labeled Tacoma as "lacking capacity" whenever state law did not grant a parallel state right or power duplicating that granted by the federal license. A close look at the decision below shows that the court engaged in the same fallacy—a fallacy rejected by each preceding decision.

All of the cases cited by the court hold merely that Tacoma has no *state right* of eminent domain to take the hatchery. None of the authorities relied upon by the court hold that absence of a state right of eminent domain incapacitates Tacoma from accepting a *federal right* of eminent domain powers. The mere fact that the City has no state right of eminent domain does not and should not mean that it lacks capacity to exercise a federal right. The court below merely assumed this *non sequitur* conclusion—an assumption which is irreconcilable with its other express findings on Tacoma's capacity to exercise its federal license.

In its "Addition to Opinion" (R. 369-371) the court below held that the state laws expressly requiring state permits for appropriation of water, construction of dams, or limiting the height of dams to 25 feet do not incapacitate Tacoma from constructing the Cowlitz project in that they conflict with "the provisions of the Federal Power Act or the terms and conditions

of plaintiff's License for said project." (R. 368) However, with the voiding of these express state laws, the status of state law with respect to these particular matters reverts to precisely the same status as that found by the court to exist regarding the right of eminent domain, *i.e.*, an absence or silence of state law. Hence, on these particular matters formerly covered by the invalidated express state statutes, there is also a "*lack of state statutory power* in the city." Yet the court finds no corresponding incapacity on the part of Tacoma to accept the federal grant and proceed under its license with respect to these matters. For example, when the sanctuary act prohibiting dams over 25 feet high was voided, the court assumed and upheld capacity in the City to build the higher dam authorized by the license, yet no state law authorizes a higher dam. The reason given is that these matters are governed by "the provisions of the Federal Power Act or the terms and conditions of plaintiff's License." Indistinguishable, however, is the petitioner's assertion of its right of eminent domain under Section 21 of the Federal Power Act.

We submit that the court below was only right in its "Addition to Opinion". The absence in petitioner of a state right of eminent domain[1] paralleling the fed-

[1] The passage or nonpassage of an act by the Washington Legislature granting a state right of eminent domain to take the hatchery is irrelevant to the present issue under Section 21. Passage of Senate Bill 264 (Appendix A; Brief of Respondent State and Directors) would simply have avoided the further delay necessitated by the instant certiorari proceedings. However, petitioner desires to correct the misleading impression given by the respondent State and Directors regarding the legislative history of Senate Bill 264. It was not Tacoma's S.B. 264 that was first voted upon by the State Senate but "Substitute S.B. 264" prepared by the Senate Committee on Public Utilities. This measure

eral right granted by the Federal Power Act can present no bar to the exercise of the federal right.

> ". . . [The Act] has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter." (p. 171)
>
> "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls. . . ." (p. 181) *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n*, 328 U.S. 152 (1946)

See also *Federal Power Com'n* v. *Oregon*, 349 U.S. 435, 445 (1955):

> ". . . To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the First Iowa decision. . . . No such duplication of authority is called for by the Act."

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provided that the City would have to pay to the Department of Game, in addition to the cost of the hatchery taken, the annual operational maintenance cost of the relocated hatchery, plus $300,000 for the construction of fish hatcheries on a different river (Skokomish river and Hood Canal). Substitute S.B. 264 passed the Senate February 27, 1957. The House appended further amendments on the floor, the most important of which was a provision which would require the City to indemnify the State annually for the loss of migrating fish caused by construction or presence of the dams. (It should be noted that both the Ninth Circuit Court of Appeals and the Washington Supreme Court below held this loss to be noncompensable. *State of Wash. Dept. of Game* v. *Federal Power Com'n.*, 207 F. 2d 391, 398 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954); *City of Tacoma* v. *Taxpayers of Tacoma*, 49 Wn. 2d 781, 307 P. 2d 567 (1957) (R. 370)). It was Substitute Senate Bill 264, as amended, which was defeated by a vote of 49 to 50 on March 12, 1957, not Tacoma's proposal, S.B. 264.

V. Cases cited by respondents to imply that Section 21 is unconstitutional are not in point.

The respondents have selected a random sentence from the case of *Driscoll* v. *Burlington-Bristol Bridge Co.*, 8 N.J. 433, 491, 86 A. 2d 201, 229 (1952), *cert. denied*, 344 U.S. 838, to support their proposition that the Federal Government "cannot grant a power to an agency of the State which the State itself has not seen fit to grant." However, this sentence can only be read properly in the context of the federal statutes the court was considering (Section 5 of Burlington-Bristol Bridge Act, 44 Stat. 589; Section 5 of Tacony-Palmyra Bridge Act, 44 Stat. 1025—both identical). These acts gave no express federal right to the Burlington County Bridge Commission to make a profit on bridge tolls,[1] but left the matter to state legislation. The next sentence in the court's opinion following that quoted by the respondents makes this clear:

> ". . . Even an interpretation of the federal acts most favorable to the defendant county would only *permit the State* to authorize the making of a profit from the operation of the bridges. . . ." (86 A. 2d 201, 229) (Emphasis supplied)

The subsequent District Court case brought by the bridge commission again reiterated this distinction:

> ". . . Indeed, this whole section merely amounts to a consent on the part of Congress that a state or its subdivision may acquire the bridges and operate them and charge tolls. The New Jersey Legislature in promulgating N.J.S.A. 27:19-32 has not seen fit to take advantage of all of the authority

[1] The bulk of the opinion is devoted by the court to its finding of "vicious" "fraud and corruption" on the part of the bridge commission in acquiring the bridge. (See 86 A. 2d at 221.)

offered by Congress. . . . ." *Burlington County Bridge Commission* v. *Meyner*, 133 F. Supp. 214, 218 (D.N.J. 1955)

The district court distinguished the cases upholding the exercise of a federal power "by the instrumentality concerned even though the power had not been granted by the state in its creation" on the ground that:

> ". . . Such is not the situation here. There is no specific federal action, by legislation or otherwise, granting to *the Burlington County Bridge Commission* the right to charge tolls which would provide for a profit on its cost in acquiring the two bridges. . . ."[1] (133 F. Supp. at 217)

Another portion of *Driscoll* v. *Burlington-Bristol Bridge Co., supra*, not cited by respondents, appears to directly support petitioner's present contention. The State of New Jersey sought to condemn the bridges then owned by its sub-division, the Burlington-Bristol Bridge Commission, under state law *or* federal law. The New Jersey Supreme Court first referred to State law, concluding the State Legislature had withdrawn from the State any power to condemn property owned by a public agency. The court next turned to

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[1] The further distinction of the court that

> ". . . in none of those cases was there a prior adjudication by a state court holding that the instrumentality concerned was without power to exercise the authority granted by federal action." (133 F. Supp. at 217)

is not quite accurate. In one of the cases so cited, *Seaboard Air Line R. Co.* v. *Daniel*, 333 U.S. 118 (1948), the Supreme Court of South Carolina had held that Seaboard had no power or capacity under South Carolina law to operate a railroad therein, but this was reversed by the United States Supreme Court, holding that Seaboard could exercise its federally-conferred powers delegated to it by the Interstate Commerce Commission regardless of state law.

the federal acts, which provided in identical Sections 4:

> "After the date of completion of such bridge, as determined by the Secretary of War, either the State of New Jersey, the State of Pennsylvania, any political subdivision of either of such States . . . or any two or more of them jointly [may acquire the bridges] by purchase, or by condemnation in accordance with the law of either of such States governing the acquisition of private property for public purposes by condemnation."

The court found that the bridges could not be condemned by the State under this federal statute, only because the bridges had already been acquired by a public agency thus making the federal act inapplicable by its terms:

> ". . . The State's status and ability to condemn under the federal acts is therefore dependent upon the acts themselves . . ." (86 A. 2d at 228)

The clear implication of the opinion is that had the federal act been applicable by its terms, the State could have exercised a granted federal right of eminent domain regardless of its lack of eminent domain power under state law. Cf. *Antle* v. *Tuchbreiter*, 414 Ill. 571, 111 N.E. 836, 841 (1953).

The case of *Yadkin County* v. *City of High Point*, 217 N.C. 462, 8 S.E. 2d 470 (1940), cited by respondents, concerned solely an exercise by a municipality of its state eminent domain powers. No federal powers under Section 21 of the Federal Power Act were asserted or considered.[1]

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[1] The North Carolina Supreme Court in the companion case to *Yadkin—McGuinn* v. *City of High Point*, 8 S.E. 2d 462 (1940)—had voided the federal license held by the city on the ground that the Federal Power Commission had improperly found the river in question to be navigable.

The quotation in respondent State and Directors' brief from *United States* v. *Tarble*, 13 Wall. 397, 406 (1871), was ended too soon. That Court recognized a "particular" exception to the general rule that neither federal nor state governments should intrude on the jurisdiction of the other:

> "... That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land, and the judges of every state are bound thereby, 'anything in the Constitution or laws of any state to the contrary notwithstanding.' ..."

In *City of Trenton* v. *New Jersey*, 262 U.S. 182 (1923); *Claiborne County* v. *Brooks*, 111 U.S. 400, 410 (1884); *United States* v. *City Council of Keokuk*, 6 Wall. 514, 516 (1868); *Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168 (1942); and *Arkansas-Missouri Power Co.* v. *City of Kennett*, 78 F. 2d 911 (8th Cir. 1935), cited by respondents, the only matter at issue was the general question of relationships between a state and its municipalities under state law,[1] and none involved a federal statute granting specific federal rights or duties pursuant to Congress' power to regulate interstate commerce. When Congress has so acted, its enactments become the supreme law of the land.

> "... Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that

[1] Many similar cases exist regarding a state's power over private corporations, yet the respondents appear to concede that such corporations may exercise federal powers granted by Section 21.

end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *M'Culloch* v. *Maryland*, 4 Wheat. 316, 421 (U.S. 1819)

CONCLUSION

For the reasons stated in our opening brief and in this brief, it is respectfully submitted that the judgment below, insofar as it is adverse to the Petitioner, should be reversed.

Respectfully submitted,

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APPENDIX

1. The Federal Power Act, 41 Stat. 1063, *et seq.*, as amended, 16 U.S.C. 791, *et seq.*, provides in part (supplemental to extracts in Appendix A of opening Brief):

Section 10(a), (b), (c), (e)
(16 U.S.C. § 803(a), (b), (c), (e)).

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project-works before approval.

(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of one hundred horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes,

shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

* * * *

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project

is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes; except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than one hundred horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

Section 13 (16 U.S.C. § 806).

SEC. 13. That the licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply ade-

quately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, have been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 26 hereof.

Section 14 (16 U.S.C. § 807).

SEC. 14. Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the ex-

pense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

Section 18 (16 U.S.C. § 811).

SEC. 18. The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of War, and such fishways as may be prescribed by the Secretary of Commerce. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this Act, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control

of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of War; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 316 hereof.

Section 19 (16 U.S.C. § 812).

SEC. 19. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a com-

mission or other authority for the regulation and control of that specific matter.

Section 20 (16 U.S.C. § 813).

SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and

practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act.

Part II. Section 201(f) (16 U.S.C. § 824(f)).

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 509

THE CITY OF TACOMA, A Municipal Corporation,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents pray that the City of Tacoma's petition for a writ of certiorari be denied for the reason that no federal question exists in this case to invoke the jurisdiction of the United States supreme court, and the principle of law on which the supreme court of the State of Washington based its decision in this case, namely, the state's right to control its municipal subdivisions, is a well settled principle which has been consistently applied by the supreme court of the United States.

OPINION BELOW

The opinion of the supreme court of the State of Washington (No. 33706), which is sought to be reviewed in this case, is reported in the official Washington Reports (incorrectly cited in city's petition) in 49 Wn. (2d) 781, 307 P. (2d) 567 (1957) (Pet. App. A, pp. 1a-48a; R. 441-486, 555-557), and the petition for rehearing was denied in 49 Wn. (2d) 825, 307 P. (2d) 567 (1957) (Pet. App. F, p. 131a; R. 558).

LACK OF JURISDICTION—NO FEDERAL QUESTION

Contrary to petitioner's claim, there is no federal question by which the jurisdiction of this court may be invoked under 28 U. S. C. § 1257 (3). The validity of a federal statute was never drawn in question, nor was a federal title, right, privilege, or immunity specially set up or claimed in the state courts. The only question raised in this case concerns the character and the extent of the powers of a municipal corporation of the State of Washington, which is purely a question of local law.

We wish to call the court's attention to the fact that petitioner has failed to comply with United States Supreme Court Rule 23 (1) (f), as will hereinafter be shown.

STATUTES INVOLVED

Contrary to petitioner's claim on page 4 of its petition, § 21 of the Federal Power Act is not the statute involved in this case. The state supreme court did not even mention § 21 in its opinion, let alone hold it invalid. The court was only concerned with

petitioner's municipal powers and examined only the state statutes which are the source of such powers. In its opinion the court refers to RCW 8.12.030, RCW 80.40.010, and other state statutes to which its attention had been drawn. (Pet. App. A, pp. 17a-18a; R. 459.) These statutes are too lengthy to set forth in this brief and are not necessary to this court's disposition of the case. It is sufficient to say that they neither permit the City of Tacoma to condemn state land previously dedicated to a public use, nor to receive a federal grant of condemnation power to condemn such land.

QUESTION PRESENTED

May the State of Washington enjoin its own municipal corporation from condemning state land previously dedicated to public use, when such municipal corporation does not have the inherent power from its creator (1) to condemn such land, or (2) to receive a grant of federal condemnation powers?

The question which petitioner claims is a federal question was stated by the Washington state supreme court, as a subsidiary question, in specific terms as follows (Pet. App. A, p. 18a; R. 459):

> "* * * specifically, can the city of Tacome *receive* the power and capacity to condemn state-owned lands previously dedicated to a publice use, from the license issued to it by the Federal power commission in the absence of such power and capacity under state statutes?" (Emphasis supplied.).

The court did not question the right of Congress to *grant* eminent domain powers. It merely questioned

the inherent power of the City of Tacoma to *receive* or *accept* such a grant.

SUPPLEMENTAL STATEMENT OF THE CASE

We only agree with the chronological order of the steps taken in the history of this litigation as petitioner has related them. There are, however, a number of comments that are badly slanted and a warped picture of the proceedings is given. Petitioner is argumentative and does not state the facts objectively. Further, petitioner has included much immaterial matter, including matter outside the record, and has failed to include other matters we deem material.

The prior cases in the history of this litigation cited by petitioner are not before this court for review. Suffice it to say, that after issues were joined and a trial had on the merits—and this did not occur until the instant case sought to be reviewed—the supreme court of the State of Washington found that Tacoma, one of the state's municipal subdivisions, proposed to acquire by eminent domain, for a proprietary function, property its sovereign state had many years previously dedicated to a governmental use. This the court held Tacoma could not do. The question presented is not a federal one—it is peculiarly a state one.

Following this decision, the City of Tacoma, petitioner herein, had introduced before the state legislature Substitute Senate Bill 264 which would have authorized it to condemn the necessary state land in question (R. 518). The bill was defeated indicating that the legislature of the State of Washington does not intend to give its municipality, the City of Tacoma,

the power to either condemn its state lands or to receive such power from the federal government.

In reviewing the history of this litigation, petitioner has failed to call the court's attention to another action which has an important bearing on this case. In 1955, the City of Tacoma brought an action in federal court, western district of Washington, against the sovereign State of Washington and others, involving the instant license, to condemn certain parcels of public and private property under § 21 of the Federal Power Act. *City of Tacoma v. Severns, et al., State of Washington, et al.*, U.S.D.C. (W.D.S.D.) No. 1892 (R. 160 A-160 B). The court dismissed the action on the ground that the City of Tacoma did not have authority under state law to bring an action in federal court under § 21 of the Federal Power Act.

REASONS FOR DENYING WRIT

A—FEDERAL QUESTION NOT PROPERLY PRESENTED

Even if there were a federal question in this case, a contention with which we do not agree, the petition must comply with the provisions of United States Supreme Court Rule 23 (1) (f), which provides in part:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions

of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

The petition in this cause is fatally defective in that it does not disclose the stage in the proceedings or the manner in which the alleged federal question was raised; nor does it show the method of raising it and the way it was passed upon by the court, with pertinent quotations and references. A federal question was not even raised by petitioner in its pleadings. We deem these matters to be jurisdictional.

B—NO FEDERAL QUESTION

By way of introduction this court should keep in mind the following well settled principles of law which govern this court.

The powers of municipal corporations are derived solely from the state of their creation, through the legislature, and such powers may be enlarged, abridged, or entirely withdrawn by the state legislature at its pleasure. This absolute right to exclusively control their respective municipal corporations is reserved to the states under the tenth amendment to the United States constitution. The tenth amendment is the supreme law of the land and is just as controlling in its field as the commerce clause is in its field. In *City of Trenton v. New Jersey* (N. J. 1922), 262 U. S. 182, 187, the court said:

"* * * A municipality is merely a department of the state, and the state may withhold, grant, or withdraw powers and privileges, as it sees fit. However great or small its sphere of action, it remains the creature of the state, exercising and holding powers and privileges subject to the sovereign will [Citing case.]"*.

In *U. S. ex rel. Moses v. City Council of Keokuk* (Ia. 1867), 6 Wall. (U.S.) 514, 516, this court held that "it is quite clear" that all the rights, duties, and obligations of a municipal corporation must be ascertained and defined by the laws of the state of its creation.

This court is bound by the decisions of the highest courts of the states as to the powers of their municipalities, and it will not review such nonfederal questions. *Chicago v. Fieldcrest Dairies* (Ill. 1941), 316 U.S. 168, 171-173, 86 L. ed. 1355, 1357-1358, 62 S. Ct. 986.†

In *Southwestern Bell Telephone Co. v. Oklahoma* (Okla. 1938), 303 U.S. 206, 212-213, this court prescribed the following rule to be followed when reviewing state court decisions:

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* In accord are *Joslin v. Providence* (R.I. 1922), 262 U.S. 668, 674; *Southern Iowa Electric Co. v. Chariton* (Ia. 1920), 255 U.S. 539, 546; *Williams v. Eggleston* (Conn. 1897), 170 U.S. 304, 310; *Laramie County v. Albany County* (Wyo. 1875), 92 U.S. 307, 307; *Barnes v. District of Columbia* (D.C. 1875), 91 U.S. 540. 544-545; *Rogers v. City of Burlington* (Ia. 1865), 3 Wall. (U.S.) 654.

† In accord are *Railroad Commission v. Los Angeles R. Corp.* (Cal. 1929), 280 U.S. 145, 152, 74 L. ed. 234, 310, 50 S. Ct. 71; *Georgia Railway & Power Co. v. Decater* (Ga. 1922), 262 U.S. 432, 438; *St. Louis & K.C. Land Company v. Kansas City* (Mo. 1915), 241 U.S. 419, 427; *Old Colony Trust Co. v. Omaha* (Neb. 1912), 230 U.S. 100, 116; *Fischer v. St. Louis* (Mo. 1904), 194 U.S. 361, 369-370; *Schefe v. St. Louis* (Mo. 1904), 194 U.S. 373.

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. [Citing cases.]"

The following quotations from the state court decision sought to be reviewed should convince this court that not only was there no federal question presented or decided by the state court, but a decision based thereon was not necessary to the determination of the cause. After holding that petitioner was not authorized to condemn state land previously dedicated to a public use, the court considered the subsidiary question of whether petitioner could receive that power under its federal license. Following the statement of this question, the court continued:

> "This is not a question of the right of the Federal government to control all phases of activity on navigable streams, nor a question of its power, under the Federal power act, to delegate that right. It only questions the capacity of a municipal corporation of this state to act under such license when its exercise requires the condemnation of state-owned property dedicated to a public use." (Pet. App. A, p. 18a; R. 459.)

After pointing out that the question of the legal capacity of the City of Tacoma to act under the license issued by the federal power commission was specifically

excluded from consideration by the ninth circuit court of appeals, the state supreme court continued:

> "Hence, this case is not *res judicata* against the state of Washington. As we have heretofore pointed out, the city does not have the capacity to act under the license. Its inability to act, in the manner which we have discussed, is inherent in its very nature. *Its inability so to act can be remedied only by state legislation that expands its capacity.*" (Court's emphasis.) (Pet. App. A, p. 19a; R. 460.)

The court then distinguished the instant case from the *First Iowa* case and concluded with the following:

> "In the instant case, the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition*; it presents a question of *lack of state statutory power* in the city. It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the state of Washington." (Court's emphasis.) (Pet. App. A, p. 20a; R. 461.)

Since the state court concluded that it was not deciding any federal question, this court should abide by that conclusion also. In *Herb v. Pitcairn* (Ill. 1945), 324 U.S. 117, 128, this court said:

> "It is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law. * * *"*

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* See also *Black v. Cutter Laboratories* (Cal. 1956), 351 U.S. 292, 298; *Dibble v. Bellingham Bay Land Co.* (Wash. 1895), 163 U.S. 63, 69.

ARGUMENT IN ANSWER TO PETITIONER

On pages 14 through 23 of its petition, the city presents its argument for granting the writ under four headings. Without repeating the headings, we will refer to them by number and answer each one in numerical order.

1. Petitioner has been deprived of no federal right. The question is not whether Congress can *grant* eminent domain powers, but whether petitioner is authorized to *receive* them.

2. The state court's decision sought to be reviewed here does not conflict with *First Iowa Hydroelectric Coop. v. Federal Power Commission* (Ia. 1946), 328 U.S. 152. That case involved a police power measure and not an exercise of a state's control over its subordinate units of government.

3. None of the cases cited by petitioner on pages 17-22 are in point. As to petitioner's first principle, we agree that an agent of the federal government can build a dam on a navigable stream if the source of its power permits it to do so. Tacoma is an agent of the State of Washington and not of the federal government. The state supreme court has held that neither its charter nor the state statutes which are the source of its municipal powers authorize Tacoma to build the Cowlitz project according to the plan set forth in its ordinance No. 14386, as amended.

Directly in point are the two companion cases of *McGuinn, et al. v. City of High Point*, 217 N.C. 449, 8 S.E. (2d) 462 (1940), and *Yadkin County v. City of High Point*, 217 N.C. 462, 8 S.E. (2d) 470 (1940). See also *Driscoll v. Burlington-Bristol Bridge Co.*, 8

N.J. 433, 86 A. (2d) 201, 229 (1952), cert. den. 344 U.S. 838, reh. den. 344 U.S. 888, wherein the late Chief Justice Vanderbilt, of the New Jersey supreme court, said:

> "* * * Quite obviously the Federal Government cannot grant a power to an agency of the State which the State itself has not seen fit to grant. * * *"

The foregoing proposition was upheld in *Burlington County Bridge Commission v. Meyner*, 133 F. Supp. 214 (1955). In addition, see Judge Boldt's opinion in *City of Tacoma v. Severns, et al., State of Washington, et al.*, U.S.D.C. (W.D.S.D.) No. 1892, *supra* (R. 160 A-160B), wherein he said (R. 160B):

> "The federal government does not have authority to remove limitations on the powers of Washington cities expressly provided by the Legislature of that sovereign state. Accordingly, Section 814 of the Federal Power Act (Title 16 U.S.C.A.), which grants the right of eminent domain in district courts of the United States to licensees of the Federal Power Commission, does not remove or affect the limitations of the condemnation powers of Washington cities."

As to petitioner's second principle, regardless of whether the federal government may do so or not, a municipality created by a sovereign state cannot condemn the land of such state without its consent, since this would permit a municipality to destroy the very sovereign which created it.

None of the cases cited under petitioner's third, fourth and fifth principles are in point. In none of these cases was the parent state objecting that its

municipality was acting *ultra vires*, as is the case here, nor was the inherent power of a corporation, under its charter and laws of its creation, to receive or accept a grant of federal condemnation powers in issue. In some of the cases the question was whether Congress had authority under the constitution to *grant* eminent domain powers, but no question was ever raised as to the power of the grantee to *receive* them. In fact, the case of *Latinette v. City of St. Louis*, 201 Fed. 676, 677 (7th Cir. 1912), strongly relied upon by petitioner, illustrates this point. In that case the court expressly found that it was settled beyond controversy that Missouri by her statutes and decisions had authorized St. Louis "to accept a federal grant of right to appropriate lands in Illinois." The only question before the court was the power of the federal government to make such a grant. If St. Louis, on the other hand, had attempted to condemn land in its parent state of Missouri, without that state's consent, the result of the case would necessarily have been different.

4. Petitioner fails in its attempt to create an important question of federal-state relationship.

The state decision acknowledges that the dam may be built by any agency capable of receiving the power.

The suggestion that the sovereign state might acquire land for the express purpose of preventing petitioner from proceeding under its federal license is unworthy and not justified by the record. The state fish hatchery involved was in existence for many years prior to petitioner's declaration of intention to build.

Petitioner refers to its broad powers under state law and implies that the state court incorrectly de-

cided a question of state law. There is here no federal question. In holding that petitioner, a creature of the state, could not condemn the property of its creator, the sovereign, without being granted the power so to do by its creator, the court below was correct.

CONCLUSION

The decision below is clearly correct. There is no conflict of decision. There is no important question of federal law, and it is submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1957

CITY OF TACOMA, A MUNICIPAL CORPORATION,
PETITIONER

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, AND ROBERT SCHOETTLER, AS DIRECTOR OF FISHERIES, AND JOHN A. BIGGS, AS DIRECTOR OF GAME, OF THE STATE OF WASHINGTON, AND THE STATE OF WASHINGTON, A SOVEREIGN STATE.
RESPONDENTS.

BRIEF OF RESPONDENTS, THE TAXPAYERS OF TACOMA, WASHINGTON

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In the Supreme Court of the United States

OCTOBER TERM, 1957

CITY OF TACOMA, A MUNICIPAL CORPORATION,
PETITIONER

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, AND ROBERT SCHOETTLER, AS DIRECTOR OF FISHERIES, AND JOHN A. BIGGS, AS DIRECTOR OF GAME, OF THE STATE OF WASHINGTON, AND THE STATE OF WASHINGTON, A SOVEREIGN STATE,
RESPONDENTS.

BRIEF OF RESPONDENTS, THE TAXPAYERS OF TACOMA, WASHINGTON

EXPLANATORY NOTE

Respondent Taxpayers by this brief will attempt to answer the briefs of both petitioner, City of Tacoma, and amicus curiae, Federal Power Commission. They will, respectively, be referred to herein as petitioner and amicus curiae.

QUESTIONS PRESENTED

Respondents do not agree with the statement of questions presented in brief of petitioner but feel that amicus curiae have substantially presented the question, but that it is probably better phrased by quoting the language of the Washington Supreme Court:

> "Does a municipal corporation, created by the state as a subordinate unit, have the power

to condemn state lands held in a governmental capacity and previously dedicated to (fol. 451) a public use; and if not, can a municipal corporation be endowed by Federal legislation with power to condemn such lands belonging to the state?" (R. 277).

STATUTES INVOLVED

In addition to statutes cited by petitioner and amicus curiae the following statutes and charter provisions are cited by respondents, and are set forth in the Appendix, *infra* pages 30-34.

41 Stat. 1071, 16 U.S.C. 906;

41 Stat. 1074, 16 U.S.C. 814;

Laws of Washington, 1949, Chapter 9; R.C.W. 75.20.010;

R.C.W. 54.16.050;

Charter of City of Tacoma:

Article I, Section 1.2

Article IV, Section 4.1

STATEMENT OF CASE

Respondents adopt the statement of the case as set forth by amicus curiae, with the additional statement: The State of Washington had a fish hatchery located on the Cowlitz River at the site in question for a number of years prior to any proceedings by the petitioner seeking a license from the Federal Power Commission. Primary application for a license was made by the City of Tacoma on August 6, 1948, when the City filed a declaration of intent under the provisions of the Federal Power Act to construct a water power project on the Cowlitz River. The succeeding session of the Washington state legislature, which convened in Jan-

uary, 1949, as one of its first actions adopted an act known as Chapter 9, Session Laws of 1949, *infra*, p. 31, creating a Columbia River fish sanctuary, in effect limiting construction of any dam in excess of 25 feet in height on the Cowlitz River. This act passed the Washington state legislature on February 9, 1949, and was approved by the Governor on February 14, 1949, and became effective on April 1, 1949. This act was the main statute in controversy in the first Taxpayers case (*Tacoma* v. *Taxpayers of Tacoma, et al.* 43 Wn. 2d. 468) (Appendix B of Petition for Writ of Certiorari, 49a) and in the case of *State of Washington, Department of Game* v *Federal Power Commission*, 207 F. 2d. 391 (Appendix D of Petition for Write of Certiorari, page 112a). In both cases the appellate court held that the act was inoperative in view of the decision of this court in *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U. S. 152. Subsequent to the decisions in those cases the City of Tacoma filed an amended complaint (R. 144), and the Taxpayers and State of Washington each filed answers and affirmative defenses to the amended complaint of the City of Tacoma (Taxpayers, R.217; State of Washington, R.191), answering the amended complaint and denying certain allegations, and setting up for the first time the affirmative defense that the City did not have the authority to condemn the hatchery belonging to the State of Washington.

Charter provisions of the City of Tacoma which are pertinent to the authority of the City to construct the project are shown in Appendix A, page 33-34.

SUMMARY OF ARGUMENT

I

THE MATTER IS MOOT

This case is moot or at least will be in a short period of time as it will be impossible for the licensee to construct the project inside the time of its licenses. The license calls for the construction of two dams: Mayfield and Mossyrock. The licensee was given until December 31, 1955, to commence construction of the project and it did commence construction of the Mayfield dam prior to that date but has never commenced construction of the Mossyrock dam, which was a specified part of the project works. Under the provisions of 16 U.S.C. Section 806, *infra*, page 30, the project must be commenced within the period set by the Federal Power Commission and completed within the period set by the Commission. The final completion date is June 23, 1958; it is impossible to complete the project by that date.

II

THE CASE DOES NOT PRESENT AN ADEQUATE FEDERAL QUESTION

Historically, the Federal government has been supreme in its field and the states supreme in their field. Municipal corporations are civil departments of the state and it has always been the Federal policy that the states are supreme and the the final authority on the rights and powers of their municipal subdivisions. Even if the Supreme Court of the state of Washington were incorrect in its analysis of the Federal Power Act it still is correct in its construction of the powers and

capacity of its municipal subdivisions. The history of the Federal Power Act indicates that it was not the intention of Congress to interefere with the state's control over its officers and agents, and statements made by members of the committee in charge of legislation indicate that it was the desire of Congress not to infringe any rights of the states, but to attempt to get an act under which both Federal and State governments could operate. If Section 21 of the Federal Power Act is interpreted as suggested by petitioner and amicus curiae it will result in local subdivisions of government destroying their creator. Such was never the intention of Congress—it is not expressly granted in the Federal Power Act nor can it be reasonably inferred therefrom.

III

EMINENT DOMAIN

Section 21 of the Federal Power Act, *infra*, page 31, appears to be a venue statute. It authorizes licensees of the act to sue in the Federal courts. The general rule on eminent domain proceedings is that they shall be brought in the court of the county in which the land is situated. The act does not state that it is a grant of Federal power of eminent domain but simply states that licensees may acquire property "by the exercise of the right of eminent domain in the District Court of the United States for the district in which such land or other property may be located, or in the state courts." This court has never construed this statute and in most of the cases which have mentioned the Act the question of eminent domain has not been mentioned.

In one case, *State of Missouri ex rel. Camden County* v. *Union Elec. Light & Power Co.*, 42 Fed. (2d) 692, the court did determine that it was a grant of eminent domain. This case stands alone for this proposition. Since all persons that might apply for a licenses would normally have the power of eminent domain in the absence of a Federal grant, the statute makes the most sense, when it is construed as a grant of the right to exercise that power of eminent domain which the licensee already has, in the Federal court, and make that a court of venue as well as the state court.

IV

CASES CITED BY PETITIONER AND AMICUS CURIAE

Most of the cases cited by petitioner and amicus curiae are not pertinent to the issues in this case. They have cited numerous cases involving taking by the United States of America. That is not the question here, and no one claims that the United States cannot take property for its own use. They have cited other cases where Congress, by special act, has authorized various persons, corporations, states or municipal corporations, to exercise certain powers, including in some cases the power of eminent domain over and above the powers which they would normally have. In these cases it can be assumed that Congress determined that the Federal grant was necessary for them to accomplish the purpose for which the law had been passed. There is no special act of Congress involved in this proceeding, and in light of the Congressional history it would appear that the act was never intended to

interefere with the rights of the states in their own domain. Counsel have also cited numerous cases involving taking of private property. These cases are not pertinent as this case involves the taking of public property previously dedicated to a public use. Cases involving the taking of public property held in a proprietary capacity are not pertinent as they involve an entirely different question and type of ownership.

V

DECISION IN THE NINTH CIRCUIT COURT OF APPEALS

Petitioner claims that the decision in the Ninth Circuit Court *(State of Washington, Department of Game* v. *Federal Power Commission*, 207 Fed. (2) 391) is *res judicata.* As was pointed out in that case by the court, the question of the capacity of the city to act under the license once it had been received, was expressly withdrawn from consideration. The relationship between state and municipal corporation is a state question, and nowhere in the Federal Power Act is there any statement, or even inference, that the Federal Power Commission is authorized to determine questions of local law. As a matter of fact the Court of Appeals stated that the Federal Power Commission had no power to adjudicate such questions, and if the Commission had no power to adjudicate such a question the matter cannot be *res judicata.*

VI

PREFERENCE CLAUSE

Amicus curiae feels that the decision thwarts the preference clause of the Federal Power Act. The records show that the state of Washington has been

operating a fish hatchery, a governmental operation, on the Cowlitz River for many years and was doing so prior to any proceedings in the instant case. Washington cities do not have the capacity to acquire state property dedicated to a public use by eminent domain. The state legislature has, however, authorized Public Utility Districts to acquire state property, and if the license had been granted to an authorized public agency that public agency could have constructed the project under the Federal license. The state may specify which of its municipal subdivisions may take its property and inclusion of one does not imply inclusion of all. Rather than thwarting the Federal Power Act the case is actually an instance of the city thwarting the state.

ARGUMENT

THE MATTER IS MOOT

41 Stat 1071, Title 16, U.S.C., Section 806 provides as follows:

> The licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement

> of construction may be extended once but not alnger than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, has been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as proivded for in section 820 of this title."

The order granting the license to the City of Tacoma is shown beginning on page 27 of the Record and it may be noted that the project works for which the license was granted specified the construction of two dams—Mayfield and Mossyrock. (R 28 (2)) Pursuant to the terms of Section B, Article 28 of the order (R.45), the licensee was required to commence construction of the project within two years from January 1, 1952, and complete the project works within thirty-six months. This date was subsequently extended by order of the Commission on February 26, 1954, (R.159-160). This order provides for commencement

of the project by December 31, 1955. No reference being made to the completion date it is assumed that the completion date is an additional thirty-six months as was provided in Article 28 of the original order granting the license. The City of Tacoma entered into construction of the Mayfield dam on June 23, 1955, as was determined by the Superior Court in its findings (R.253), but the city has started no construction on the Mossyrock dam, which is a specified part of the project, and it is a certainty that the project can never be completed before June 23, 1958. Counsel realize that the city has been sorely troubled by litigation during this period but the words of the statute are clear that one and only one extension for commencement of the construction may be granted and that extension for a period of time not longer than an additional two years. Unfortunate as the situation may be, it seems to counsel that the whole matter is moot. Construction of the project in accordance with the license and the law cannot possibly be completed. Nor for that matter has it been started on the Mossyrock portion of the project, which the record shows is the major dam.

This court does not grant advisory opinions or opinion in matters that are or may be moot.[1] It is submitted that the records show this to be the present condition of this case.

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[1] *United States* v *Alaska Steamship Co.* 253 U. S. 113, 116; *Doremus* v. *Board of Education*, 342 U. S. 429, 432; *Brownlow* v. *Schwartz*, 261 U. S. 216, 217.

LIMITING THE QUESTION

Certain fundamental rules of law can be accepted to narrow the ultimate question of the present case. First, respondents admit that the United States, for its national purposes, has the right to acquire for itself by right of eminent domain property within the several states. *Kohl* v. *United States*, 91 U. S. 367, Second, where the Federal government has entered into a field within its constitutional power its rights are exclusive to any rights which the states may have in that field, and any law or constitutional provision of the states contrary to the Federal provision are inoperative and can be of no effect against the superior Federal law. *First Iowa Hydro-Electric Coop*, v. *Federal Power Commission*, 328 U.S. 152. On the basis of this decision the Washington Supreme Court, in the case of *City of Tacoma* v. *Taxpayers of Tacoma, et al*, 43 Wn. 2d. 468, held that the Washington State Sanctuary Act and other similar statutes, were inoperative since they placed additional limitation on the licensee of the Federal Power Commission over and above the limitation placed by the Federal Power Commission. To the same effect was the decision of the Court of Appeals in the case *State of Washington, Department of Game, et al.* v. *Federal Power Commission*, 207 F. 2d. 291, and the instant case, *City of Tacoma* v. *Taxpayers of Tacoma, et al.* 49 Wn. 2d. 781, 800-801. Third, the various sovereign states of the Union in the creation and authorization of various municipal subdivisions thereof, have the sole power to determine under what terms they shall come into existence and

what powers and duties they shall perform during their existence, and such municipal corporations have only such powers as have been granted by the state. In *Trenton* v. *New Jersey*, 262 U. S. 182, 187, the court stated:

> "In all these respects, the state is supreme; and its legislative body, confirming its action to the state Constitution may do as it will, unrestrained by any provision of the Constitution of the United States. . . . The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.
>
> * * *
>
> "A municipality is merely a department of the state, and the state may withhold, grant, or withdraw powers and privileges, as it sees fit. However great or small its sphere of action, it remains the creature of the state, exercising and holding powers and privileges subject to the sovereign will."

NO FEDERAL QUESTION NECESSARY FOR DETERMINATION

Coming to the instant case, the Supreme Court of Washington has determined the power and capacity of the City of Tacoma to operate under a Federal Power license. The specific point in question was stated by the Washington court (R.277):

> "Does a municipal corporation, created by the state as a subordinate unit, have the power to condemn state lands held in a governmental capacity and previously dedicated to (fol.451) a public use; and if not, can a municipal corporation be endowed by Federal legislation with power to condemn such lands belonging to the state?"

The court in that case stated in no uncertain terms (R.284):

> "We deem it conclusively settled in this jurisdiction that a municipal corporation or a public corporation does not have the power to condemn state-owned lands dedicated to a public use, unless that power is clearly and expressly conferred upon it by statute."

Then, aft · discussing the question of whether or not the petitioner had the power to condemn state-owned lands previously dedicated to a public use the court in answer to the proposition that the decision of the Court of Appeals was *res judicata* stated (R.285):

> "Hence, this case is not *res judicata* against the state of Washington. As we have heretofore pointed out, the city does not have the capacity to act under the license. Its inability to act, in the manner which we have discussed, is inherent in its very nature. *Its inability so to act can be remedied only by state legislation that expands its capacity.*" (Emphasis by the court)

After discussing the First Iowa case (328 U. S. 152) and the first Taxpayers case (43 Wn. (2d). 468), the court concluded (R.286):

> "In the instant case, the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition*; it presents a question of *lack of state statutory power* in the city. It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the state of Washington." (Emphasis by the court)

This court, in a long line of cases, has adhered to the principle that the determination by the highest court of the state of the rights of that state and its municipal subdivisions to each other is final and bind-

ing on all other courts.[2] A typical case on this point is that of *Claiborne County* v. *Brooks*, 111 U. S. 400, 410 where the court stated:

> "It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organization shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State."

While it is true that the state can pass no act or regulation inconsistent with the Federal regulation this does not mean that the Federal Power Act can be considered to have changed the rules of relationship between sovereign state and municipal subdivisions. Nowhere in the Federal Act is there any indication of this purpose, and if one is to be claimed it must be on the implied purpose of the act.

As was stated by this court in the case of *Parker* v. *Brown*, 317 U. S. 341, 351, where the appellee claimed that the Federal government (by the adoption of the Sherman act and the Agricultural Marketing Agreement Act, (7 U.S.C. Sec. 601, et seq.)), had pre-empted the field in which the state of California was attempting to regulate:

> "In a dual system of government in which under the constitution the states are sovereign, save only as Congress may constitutionally sub-

[2] *R. R. Commission of Calif.* v *Los Angeles Ry. Corp.* 280 U. S. 145, 152. *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 171. *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 613. *Richmond* v. *Smith*, 15 Wall. 429, 438. *Trenton* v. *New Jersey*, 262 U. S. 182.

> tract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

If it can be said that Congress intended one way or the other to effect state control by the adoption of the Power Act then it must be held to be the Congressional policy *not* to nullify that control, for in the Congressional discussion of the Water Power bill, Representative William L. LaFollette, of Washington, a member of the House Special Committee on Water Power, stated:

> "This bill is not based on either the Government's ownership or its sovereign authority, but on the hypothesis that we as representatives of the States have authority to act for the States in matters of this character and pass laws for the general good, by the establishment of a limited trusteeship or commission composed of officials of the Government, to carry out and administer this law in such a way as not to infringe any of the rights of the States nor to impede or restrict navigation, but rather to benefit it." 56 Cong. Rec. 9110.
>
> "We are earnestly trying not to infringe the rights of the States." 56 Cong. Rec. 9810.

Quoted in *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, 253.

The decision of the Washington court on the powers of its municipal subdivision is a final determination on all courts.[3]

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[3] The laws of the several states, except where the Constitution or Treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States. 62 Stat. 944, 28 U.S.C. 1652. See also *Erie R. Co* v. *Tompkins*, 304 U. S. 64, 78.

SECTION 21 OF THE FEDERAL POWER ACT APPEARS TO BE A VENUE STATUTE RATHER THAN ONE OF GRANT OF EMINENT DOMAIN

Petitioner and amicus curiae assume that Section 21 of the Federal Power Act (41 Stat. 1074, 16 U.S.C. 814) is a grant of eminent domain by Congress to the licensee. At page 20 of their brief amicus curiae quote a statement of Congressman Eugene Black (58 Cong. Rec. 1932). Congressman Black was not one of the members of the committee in charge of this bill and this court has stated that discussions of a bill on the floor of Congress by persons not in charge of the bill "are without weight in the interpretation of a statute." *McCaughn et al.* v. *Hershey Choc. Co.*, 283 U. S. 488, 494. The statute, rather than being a grant of power of eminent domain, appears to be a statute of venue. What was granted by this statute was the right of the licensee to exercise eminent domain in the Federal as well as the state court, subject, of course, that the amount claimed exceed $3,000.00. Generally speaking, a person or corporation, either private or municipal, in the exercise of the rights of eminent domain, must exercise those rights "in the appropriate court of the county in which the land affected by the taking lies . . ." Nichols on Eminent Domain, 3rd Edition, Section 24.7 (volume 6, page 75). Under this venue statute, (Section 21), public utility corporations and municipal corporations have gone into the United States District Courts to acquire property by eminent domain where there is no diversity of citizenship and where such taking could not be had except for this particular section of the code. Where the United States acquires

property by eminent domain for its own use it does so under provisions of 62 Stat. 937, Title 28, U.S.C. section 1403, which is also a venue statute.

> "Proceedings to condemn land for public use under the right of eminent domain, . . . are local in their nature and are to be brought in the county where the land is situated, in the absence of anything to the contrary in the controlling statutes. This rule in its practical operation conforms to the principle that the judgment of a court should not operate directly on a res outside of its jurisdiction. It also permits the purchase of realty without consultation of records of the courts of other counties. It therefore commends itself to the common sense of legislatures and is generally embodied in enactments regulating venue."
> *56 Am. Jur., page 12, Venue, section 9.*

To adopt petitioner's construction that the statute is a grant of Federal power of eminent domain rather than Federal right of venue would make the act, insofar as states' property is concerned at least, inoperative under the Eleventh Amendment to the Constitution. That amendment refers only to citizens of other states or foreign states, but this court, in the case of *Fitts* v. *McGhee*, 172 U. S. 516, 524, determined that a state may not be sued by its own citizens in the Federal District Court. Under the Eleventh Amendment it could not be sued by a non-resident.

The grant of venue in the District Court makes sense. Congress must have known that many dams would be built on rivers that constituted county boundary lines, with flooding in two or more counties. Placing venue in the District Court, where the amount

in controversy exceeded $3,000.00, would substantially aid in prosecution of such projects.

If an applicant for a license did not in the first instance have power of eminent domain it is doubtful that the Federal Power Commission would grant it a license.

Counsel have cited a number of cases supporting the proposition that the Federal Power Act is a grant of eminent domain. Licensees of the Federal Power Commission have exercised the right of eminent domain in the Federal courts against private property where there is no diversity of citizenship, this taking being under the authority of Section 21 of the Federal Power Act authorizing such actions in the United States District Court in the districts in which the land is situated.[4] In none of these cases did the court determine that Section 21 of the Federal Power Act was a grant of the power of eminent domain although the court did in several of the cases consider the question of whether or not the licensee could bring the action in the Federal court. The cases are authority for the proposition that the licensee may bring an action in the Federal court to acquire property, but there is nothing in the decision of any of them that indicates that property was being taken that was held by the public and previously dedi-

[4] *Central Nebraska Public Power & Irrigation Dist.* v. *Harrison*, 127 F. (2) 588; *Feltz* v. *Central Nebraska Public Power and Irrigation District*, 124 F. (2) 578; *Grand River Dam Authority* v. *Thompson*, 118 F. (2) 242; *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. (2) 297; *Central Nebraska Public Power and Irrigation District* v. *Fairchild*, 126 F. (2) 302; *Oakland Club* v. *South Carolina Public Service Authority*, 110 F. (2) 84; *Wilson* v. *Union Elec. Lt. & Power Co.*, 59 F. (2) 580.

cated to a public use. Nor do the cases support the position of the petitioner or amicus curiae that there is any Federal grant of eminent domain.

CASES CITED BY PETITIONER AND AMICUS CURIAE NOT PERTINENT

Petitioner and amicus curiae reason that since the United States may condemn property for its own purposes that a licensee of the Federal Power Commission has the same authority and rights of eminent domain as the United States. They cite numerous cases supporting the proposition that the United States may delegate to private persons, municipal corporations, or states, various Federal powers, including the power of eminent domain and they, therefore, reason that the United States, through the operation of the Federal Power Act, may delegate to the petitioner powers of eminent domain which would authorize the taking of the fish hatchery. Most of the cases cited by counsel for petitioner and amicus curiae are not pertinent to the point in issue in this case, but rather decide points of general law with which counsel for respondents do not disagree. While counsel do not want to devote space to all cases cited in both briefs we will refer to typical cases cited. These cases may be broken down into various classifications as follows:

1. The United States can acquire by eminent domain property within the several states for its federal purposes, whether consented to by private citizens, municipal corporations, states or any other owners. Respondents admit that this is true, and the following cases cited by petitioner and amicus curiae, while appropriate to this point, are not determinative of the ultimate

question in the case since the United States is not for itself taking the property here in question.[5]

In each one of these cases the taking was by the United States for its own purposes. That is not the case here.

2. The United States may delegate to private persons or corporations the right to take property for purposes consistent with Federal purposes, such as interstate bridges, interstate railroads, etc., and these agents under various special acts of Congress have acquired property by eminent domain beyond their place of incorporation or legal existence under state or local law, and have exercised outside the area of their state of creation powers granted by special acts of Congress.[6]

3. Private corporations under special act of Congress have been granted the right of eminent domain against public property held by a public body in a proprietary capacity.[7]

---

[5] *Oklahoma ex rel Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508; *United States* v. *Wayne County*, 252 U. S. 574; *United States* v. *Carmack*, 329 U. S. 230; *United States* v. *Gettysburg Elec. Ry. Co.*, 160 U. S. 668; *Kohl* v. *United States*, 91 U. S. 367; *United States* v. *South Dakota*, 212 F. (2) 14; *Minn.* v. *United States*, 125 F. (2) 636; *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372; *United States* v. *Montana*, 134 F. (2) 194; *United States* v. *Wheeler Township*, 66 F. (2) 977; *C. M. Patten & Co.* v. *United States*, 61F. (2) 970; *United States* v. *.8677 Acre of Land*, 42 F. Supp. 91; *United States* v. *2715.98 Acres of Land*, 44 F. Supp. 683; *United States* v. *72 Acres of Land*, 37 F. Supp. 297; *United States* v. *60 Acres of Land*, 28 F. Supp. 368; *United States* v. *40 Acres of Land*, 24 F. Supp. 390; *United States* v. *City of Tiffin*, 190 Fed. 279.

[6] *Cherokee Nation* v. *Southern Kansas Ry. Co.* 135 U. S. 641; *Luxton* v. *North River Bridge Co.* 153 U. S. 525; *Berman* v. *Parker*, 348 U. S. 26; *California* v. *Pacific R. Co.* 127 U. S. 1.

[7] *Stockton* v. *Baltimore & N. Y. Ry. Co.* 32 Fed. 9.

4. A municipal corporation may by authority of special act of Congress exercise eminent domain against private property in another state. In these cases the state of the municipal corporation had authorized the municipal corporation to so act.[8]

5. Municipal corporations have taken land previously dedicated to a public use where authority is granted by special acts of Congress, even to the extent of public property in another state.[9]

6. The states cannot place additional restrictions or limitations on the United States, its agents or licensee inconsistent with the Federal requirement where such limitation would grant a right of nullification on the part of the state.[10]

7. Section 21 of the Federal Power Act, 16 U.S.C.A.

[8] *Latinette* v. *St. Louis*, 201 Fed. 676; *County Court, Wayne County* v. *Louisa and Fort Gay Bridge Co.*, 46 F. Supp. 1 (Right to acquire property in adjoining state denied in absence of statute of that state or Federal authority).

[9] *City of Davenport* v. 3/5 *Acre of Land*, 147 F. Supp. 794. (The court called attention to the rule that where the Federal Government condemns that the presumption is that it is for a higher and federal use but that where a delegatee of the power of eminent domain is a private party or a municipal corporation and the public use sought to be condemned would be destroyed or seriously interfered with that the exercise of the power of eminent domain will be denied unless Congress had authorized it, either expressly or by necessary implication; the court found necessary implication from the wording of the special act. The city also had authority from the state of Iowa to build a bridge across the Mississippi River.

[10] *First Iowa Hydro-Electric Coop* v. *Federal Power Commission*, 328 U. S. 152; *Seaboard Airline R. R. Co.* v. *Daniel*, 333 U. S. 118; *Texas* v. *United States*, 292 U. S. 522; *Leslie Miller Inc.* v. *United States*, 352 U. S. 187; *Public Utilities Commission of California* v. *United States No. 23 Oct. Term 1957*, 26 U. S. L. W. 4140; *Johnson* v. *Maryland*, 254 U. S. 51; *Cities Service Gas Co.* v. *Kansas*, 355 U. S. 391.

Section 814, has never been construed by this court and in only three cases has the question arisen whether a licensee under the Federal Power Act has authority to take public property previously dedicated to a public use.

One case is the instant case.

The second case is one in which the petitioner places great reliance, that of *State of Missouri ex rel. Camden County* v. *Union Electric Light & Power Company*, 42 F. (2) 692. (This case has been incorrectly referred to as State of Missouri v. Union Elec. Light & Power Company). In that case, the licensee, a private corporation public utility, was permitted to acquire by eminent domain public property previously dedicated to a public use. While it does not present the identical question of a municipal subdivision taking property of the state, it does support petitioners' premise that the Federal Power Act authorizes a licensee to take publicly dedicated property under a grant of eminent domain from the Federal Power Commission.

The third case is *Yadkin County* v. *City of High Point*, 217 North Carolina, 462. In this case the city of High Point, a licensee of the Federal Power Commission, sought to acquire a county poor farm operated by Yadkin County. The state of North Carolina intervened and joined with the county in resisting the acquisition by the licensee. The North Carolina court held that since the city had not been given express authority by the state to acquire the property it had no authority to acquire it by condemnation. Section 21 of the Federal Power Act was not discussed.

While the case of *Driscoll* v. *Burlington-Bristol Bridge Co. et al*, 8 N. J. 433, 491, does not involve the Federal Power Act it does involve conduct of a municipal corporation inconsistent with the policy of New Jersey. The Burlington County Bridge Commission claimed certain rights pursuant to special acts of Congress authorizing construction of a bridge, and the New Jersey court determined that "Quite obviously the Federal Government cannot grant a p ower to an agency of the State which the State itself has not seen fit to grant." Certiorari was denied. *344 U. S. 823*. The Burlington County Bridge Commission then instituted an action in the District Court, *Burlington County Bridge Commission* v. *Meyner*, 133 Fed. Supp. 214, and that court, passing on the matter, stated:

> "There is therefore a clear adjudication by the Supreme Court of New Jersey to the effect that the plaintiff, by virtue of its creation under the state legislation, has no power to charge tolls which include a factor of profit. It is that adjudication which defendants set up as an estoppel and which plaintiff attacks as beyond the scope of the authority of the State court.
>
> "Plaintiff advances several cases for the proposition that Congress may confer upon an instrumentality a power not specifically granted by the State for its creation. They are all distinguishable from the instant case.
>
> "In each of the cases of *Stockton* v. *Baltimore & N. Y. R. Co.*, C.C.N.J. 1887, 32 F. 9, appeal dismissed, 1891, 140 U. S. 699, 1 S. Ct. 1028, 35 L. Ed. 603; *Seaboard Air Line R. Co.* v. *Daniel*, 1948, 333 U. S. 118, 68 S. Ct. 426, 92 L. Ed. 580; *Latinette* v. *City of St. Louis*, 7 Cir. 1912, 201 F. 676; and *City of Newark* v. *Central R.*

> *Co.*, D. C. N. J. 1923, 287 F. 196, affirmed 3 Cir. 1924, 297 F. 77, affirmed 1925, 267 U. S. 377, 45 S. Ct. 328, 69 L. Ed. 666, there was involved a specific federal act granting a certain power to a defined existent instrumentality. In each of those cases it was held that the specific power could be exercised by the instrumentality concerned even though the power had not been granted by the state in its creation. Such is not the situation here. There is no specific federal action, by legislation or otherwise, granting to the Burlington County Bridge Commission the right to charge tolls which would provide for a profit on its cost in acquiring the two bridges. *Furthermore, in none of those cases was there a prior adjudication by a state court holding that the instrumentality concerned was without power to exercise the authority granted by federal action.*" (Emphasis supplied.)

See also *Arkansas Missouri Power Co.* v. *City of Kennett*, 78 F. (2) 911, 922:

> "The city derives none of its powers from the United States. It is a creature of the State of Missouri and has only such powers as the state has given it."

Amicus curiae argues that "the alleged rule of Washington law, limiting condemnation of property dedicated to prior public use, does not support the decision below". (Brief Amicus Curiae, page 44). This argument needs little answer. The Washington Supreme Court is certainly a better judge of its own decisions than any other person or group could be. It states the rule, and so far as Washington is concerned, it is the rule relative to rights between state and municipal subdivisions."

"*Wore R. Co.* v. *Tompkins*, 304 U. S. 62 Stat. 911, Section 28 U.S.C.A. 1652.

CLAIM THAT DECISION OF COURT OF APPEAL IS RES JUDICATA TO PRESENT ACTION

Petitioners claim that the decision of the Ninth Circuit Court of Appeals, *State of Washington, Dept. of Game* v. *Federal Power Commission*, 207 Fed. (2) 391, is res judicata. This claim is without merit. That case was an appeal from the order of the Federal Power Commission granting petitioner herein a license. The objection of the State Department of Game (App. to Petition for Certiorari 118a) was that:

> "1. Tacoma has not obtained from the State Supervisor of Hydraulics a permit for the diversion of water as required by Ch. 112, § 46, State of Washington Laws of 1949.
>
> "2. Tacoma has not obtained the written approval of the State Directors of Fisheries and of Game as to plans and specifications for the proper protection of fish life in connection with the construction of the dams as required by Ch. 112, § 49, State of Washington Laws of 1949.
>
> "3. Both of the proposed dams exceed the 25-foot height limit which the Washington legislature put upon the construction of dams on the Cowlitz River or on any stream of the State tributary to the Columbia River downstream from the McNary Dam and within the migratory range of anadromous fish. The Columbia River Sanctuary Act. Ch. 9, § 1, State of Washington Laws of 1949.

Counsel cite the provisions of 54 Stat. 626, 16 U.S.C. Sec. 825 l(b), in support of their position. This statute provides in part that:

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing un-

> less there is reasonable ground for failure so to do. . . . The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28."

It is fundamental that parties participant at a hearing before an administrative agency are not required to submit to that agency for its adjudication matters beyond the scope of the authority of that agency to determine. It is also fundamental that the relationship between the State and its municipal subdivisions is a matter *wholly* for determination by the courts of that state. As the Court of Appeals so aptly stated in answer to the question of "legal capacity" of the city:

> "Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States. *However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them.*" (Emphasis supplied). (396-397).

If the Commission has no such authority what could be accomplished by either presenting for consideration, or failing to present for consideration, the matter of

the relationship between sovereign state and municipal subdivision. If the Federal Power Commission has no authority to adjudicate the "legal capacity" of the City of Tacoma to initiate and act under the license once it is granted, then there is no need under Section 825 l(b) to urge the matter in application for re-hearing and failure to do was reasonable.

We call attention to the previsions of the city Charter. (Appendix page 33, 34). The powers that the city has by its Charter are the powers granted to it "by the Constitution and laws of the State and powers implied thereby".

Petitioner, at page 70, of its brief, calls attention to the fact that "property" of the State was brought before the Court of Appeals and quoted excerpts from the State's brief in that case. Counsel for respondents have examined this brief. None of the petitioner's present counsel represented the City of Tacoma, which was intervenor in that case, and hence they may be excused from propounding a meaning to "property" that was not present in that proceeding. The "property" being discussed before that court was the fish that swam and spawned in the Cowlitz River. The State claimed that the dams would destroy this "property". The court, page 397 of its opinion, indicated that this was the "property" referred to when it stated "they contend that the project will destroy the runs of Spring Chinook salmon, etc." The Court of Appeals made it quite clear that it was not passing upon the right or the legal capacity of the city to act but rather on the fact that the Federal Power Commission had a right

to grant a license and the city, *if it had capacity otherwise*, could proceed under that license.

CLAIM THAT LOWER COURT DECISION THWARTS PREFERENCE CLAUSE OF THE FEDERAL POWER ACT

Amicus curiae make considerable point of the fact that "the decision below would improperly frustrate the Cowlitz project and the Federal Power Commission's choice of licensee (Brief amicus curiae, page 14). They urge that the public preference provisions of the Act would be completely thwarted if the Federal Power Commission cannot grant the City of Tacoma a license; they infer that no one would ever be able to build a dam on the Cowlitz River except the United States. Both petitioner and amicus curiae infer in their brief that such a result would give the states a means of getting around the rule of the First Iowa case and other cases, and that states could buy up property in the area of a contemplated power project and defeat the Federal purpose. This is nonsense. The Federal Power Commission was in error if it assumed that the City of Tacoma had the power to acquire property of the state by eminent domain. There is however, legislative authority for Public Utility Districts of the state of Washington to acquire state property, and this authority is found under the provisions of R.C.W. 54.16.050 (Appendix page 32).

It is beneath the dignity of petitioner or amicus curiae to infer that the State of Washington has acquired this fish hatchery to thwart the Federal Power Commission. The State of Washington for many years prior to any proceedings in this matter has been operating a fish hatchery here and rather it

is an attempt by the Federal Power Commission and Tacoma to thwart the State of Washington in its governmental functions.

CONCLUSION

It is respectfully submitted that the decision of the Washington Court is correct and that it should be affirmed.

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APPENDIX

41 Stat. 1071, 16 U.S.C., Section 806:

"The licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or if any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, has been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the

sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 820 of this title."

41 Stat. 1074, 16 U.S.C., Section 814:

"When any licensee can not require by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.00. (June 10, 1920, c. 285, § 21, 41 Stat. 1074)

Laws of 1949, Chapter 9, Sec. 1; R.C.W. Section 75.20.010:

"All streams and rivers tributary to the Columbia River downstream from McNary Dam are hereby reserved as an anadromous fish sanctuary against undue industrial encroachment for the preservation and development of the food and game fish resources of said river system and to that end there shall not be con-

structed thereon any dam of a height greater than twenty-five feet that may be located within the migration range of any anadromous fish as jointly determined by the director of fisheries and the director of game, nor shall waters of the Cowlitz River or its tributaries or of the other streams within the sanctuary area be diverted for any purpose other than fisheries in such quantities that will reduce the respective stream flows below the annual average low flow, as delineated in existing or future United States Geological Survey reports: Provided, That when the flow of any of the streams referred to in this section is below the annual average, as delineated in existing or future United States Geological Survey reports, water may be diverted for use, subject to legal appropriation, upon the concurrent order of the director of fisheries and director of game."

PUBLIC UTILITY DISTRICTS

R.C.W. 54.16.050

"Water rights. A district may take, condemn and purchase, purchase, and acquire any public and private property, franchises and property rights, including state, county, and school lands, and property and littoral and water rights, for any of the purposes aforesaid, and for railroads, tunnels, pipe lines, aquaducts, transmission lines, and all other facilities necessary or convenient, and, in connection with the construction, maintenance, or operation of any such utilities, may acquire by purchase or condemnation and purchase the right to divert, take, retain, and impound and use water from or in any lake or watercourse, public or private, navigable or non-navigable, or held, owned, or used by the state, or any subdivision thereof, or by any person for any public or private use, or any underflowing water within the state; and the

district may erect, within or without its limits, dams or other works across any river or watercourse, or across or at the outlet of any lake, up to and above high water mark; and, for the purpose of constructing or laying aqueducts or pipe lines. dams, or waterworks or other necessary structures in storing, retaining, and distributing water, or for any other purpose authorized hereunder, the district may occupy and use the beds and shores up to the high water mark of any such lake, river, or watercourse, and acquire by purchase or by condemnation and purchase, or otherwise, any water, water rights, easements, or privileges named herein or necessary for any of such purposes, and a district may acquire by purchase, or condemnation and purchase, or otherwise, any lands, property, or privileges necessary to protect the water supply of the district from pollution: *Provided*, That should private property be necessary for any of its purposes, or for storing water above high water mark, the district may condemn and purchase, or purchase and acquire such private property."

PERTINENT PROVISIONS CITY CHARTER CITY OF TACOMA

"Article I, Section 1.2. The city shall have all powers now or hereafter granted to like cities by the Constitution and laws of the state, and all powers implied thereby, and shall have and exercise all municipal rights, powers, functions, privileges and immunities, except as prohibited by law or by this charter. The city may acquire property within or without its corporate limits for any city purpose by purchase, condemnation, lease, gift, and devise, and may hold or dispose of such property as the interests of the city may require. No enumeration of particular powers by this charter shall be deemed to be exclusive.

"Article IV, Section 4.1. The city shall possess all the powers granted to cities by state law to construct, condemn and purchase, purchase, acquire, add to, maintain, and operate, either within or without its corporate limits, including but not by way of limitation, public utilities for supplying water, light, heat, power, transportation, and sewage and refuse collection, treatment, and disposal services, or any of them, to the municipality and the inhabitants thereof; and also to sell and deliver any of the utility services above mentioned outside its corporate limits, to the extent permitted by state law."

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In the Supreme Court of the United States

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 509

THE CITY OF TACOMA, a Municipal Corporation,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State, *Respondents*.

BRIEF OF RESPONDENT DIRECTORS AND STATE OF WASHINGTON

OPINION BELOW

The opinion of the supreme court of the State of Washington is reported at 49 Wn. (2d) 781, appears in the record pp. 268-313 and 369-371, and is printed as Appendix A to the petition for certiorari in this case.

JURISDICTION

The jurisdiction of this court rests upon 28 U. S. C. § 1257 (3). Certiorari was granted on December 9, 1957 (R. 383).

STATUTE INVOLVED

The statute attempted to be drawn in question is § 21 of the Federal Power Act, 41 Stat. 1063, *et seq.*, 16 U. S. C. § 814.

QUESTION PRESENTED

The sole question presented is stated by the supreme court of the State of Washington on page 791 of the decision as follows:

> "Does a municipal corporation, created by the state as a subordinate unit, have the power to condemn state lands held in a governmental capacity and previously dedicated to a public use; and if not, can a municipal corporation be endowed by Federal legislation with power to condemn such lands belonging to the state?" (R. 277.)

The question was again specifically stated by the state supreme court on page 798 of the decision as follows:

> "* * * can the city of Tacoma receive the power and capacity to condemn state-owned lands previously dedicated to a public use, from the license issued to it by the Federal power commission in the absence of such power and capacity under state statutes?" (R. 284-285.)

STATEMENT

The City of Tacoma, Washington, by ordinance authorized construction of the public utility involved in this case under the authority contained in the Revised Code of Washington cited as RCW 80.40.010, which specifically allowed the condemnation of private property only for such a purpose.

Under the settled law of the state this did not grant the city authority to condemn property owned by the State of Washington and devoted by it to a public use, such as highways, and the supreme court of the State of Washington so held in this case. (R. 284, R. 371.)

The construction of the project proposed by the City of Tacoma as planned required the flooding of state property, including state highways and a fish hatchery which had been owned and operated by the State of Washington since 1941. (R. 229, R. 175.)

Provision is made by state law for the replacement of state-owned property which it would be necessary to acquire for such a facility, where that would be possible, and the subsequent acquisition of the property for the project when no longer necessary for governmental purposes.

In the case of highways, for instance, that authority is contained in RCW 90.28.010 and .020; in the case of the fish hatchery, in RCW 77.12.210. Such statutory methods are exclusive. *State ex rel.*

Polson Logging Co. v. Superior Court, 11 Wn. (2d) 545, 554.

Tacoma, in compliance with state procedure, applied for and received from the department of conservation and development of the State of Washington a permit to construct the dam near Mayfield and a preliminary permit for the construction of the Mossyrock dam. The director did not issue a final permit for the Mossyrock dam, and the city filed a mandamus action directly in the supreme court of the State of Washington to compel the issuance of the permit. *State ex rel. Tacoma v. Rogers*, 32 Wn. (2d) 729.

The application was denied on the 10th day of March, 1949, because an act of the Washington legislature prohibiting the construction of a dam over 25 feet high in a fish sanctuary area would go into effect before the dam could be constructed. *State ex rel. Tacoma v. Rogers*, 32 Wn. (2d) 729, 732.

When Tacoma received its license from the federal power commission the instant action was commenced to test its capacity under state law. In this action the supreme court of the state struck down the fish sanctuary act just referred to, together with all other statutes of the state which would "enable state officials to exercise a veto over said project," leaving only the precise question of the capacity of the City of Tacoma to injure its creator by the taking of property devoted to a public use without being authorized by the state so to do.

The license granted by the federal power commission was reviewed and sustained by the United States court of appeals for the ninth circuit. *State of Washington Department of Game v. Federal Power Commission* (1953), 207 F. (2d) 391, cert. den. 347 U. S. 936.

That court, in declining to interfere with the license, said (p. 396):

> "* * * However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. * * *"

In order to test its capacity "to initiate and act" under the license, Tacoma filed the instant action in a state court, raising questions of state law.

The action was one for declaratory judgment (RCW 7.24.010, *et seq.*) and to test the validity of a necessary bond issue (RCW 7.25.010 and .020). The complaint alleged that the action was brought "particularly for the purpose of determining whether or not Chapter 9, Laws of 1949 [fish sanctuary act] * * * or any other law of the State of Washington, is a bar to such constructions and to the issuance and sale of bonds by plaintiff for such purposes."

Defendant, Taxpayers of Tacoma, demurred (R. 53). The demurrer was sustained (R. 59). On the appeal of the city, the supreme court of the State of Washington reversed (R. 92). *Tacoma v. Taxpayers*, 43 Wn. (2d) 468, 494. In accordance with this opinion rendered on October 14, 1953, the case

was returned to the trial court for further proceedings and trial on the merits.

Before the case was brought to trial Tacoma filed in the United States district court for the western district of Washington a condemnation action in which the State of Washington was named as a party defendant. The state moved to dismiss. That motion was granted by the Honorable George H. Boldt, judge, on June 15, 1955 (R. 176). In his ruling, Judge Boldt said (R. 177):

> "The federal government does not have authority to remove limitations on the powers of Washington cities expressly provided by the legislature of that sovereign state. Accordingly, Section 814 of the Federal Power Act (Title 16 U. S. C. A.), which grants the right of eminent domain in district courts of the United States to licensees of the Federal Power Commission, does not remove or affect the limitations on the condemnation powers of Washington cities."

The city then voluntarily dismissed this action (R. 273).

On June 21, 1955, and prior to the trial of the instant action in which the city sought to determine its rights, it authorized the sale of bonds for the project involved in this case, and on June 22, 1955, awarded contracts for the construction of Mayfield dam. An ordinance authorizing the condemnation of the state fish hatchery was also passed (R. 271).

These steps on the part of Tacoma necessitated the framing of new issues, and on June 24, 1955, a motion for restraining order *pendente lite* was filed

(R. 123). A temporary order was granted so that the *status quo* would be preserved (R. 129).

On August 16, 1955, the Washington state game commission, acting under the authority contained in RCW 77.12.210, considered the question of whether or not the fish hatchery could be certified for sale as "not necessary for the purposes for which it was acquired."

The game commission found that the operation of the fish hatchery was necessary, that no alternate site could be found, and that it was completely irreplaceable (R. 175).

Before the opinion of the state supreme court in the instant case was filed, Tacoma obtained introduction in the legislature of the State of Washington of a bill, known originally as Senate Bill 264, which "would authorize the City to acquire the Mossyrock Fish Hatchery through condemnation proceedings, if negotiation for purchase within 60 days is unsuccessful." (R. 341.)

A copy of this bill, together with a portion of the legislative record showing legislative action and ultimate defeat of Substitute Senate Bill 264 in the House on March 12, 1957 (R. 368), is attached hereto as Appendix A.

After pointing out that the question of the legal capacity of the City of Tacoma to act under the license issued by the federal power commission was specifically excluded from consideration by the court of appeals for the ninth circuit in *State of Washing-*

ton Department of Game v. Federal Power Commission (1953), 207 F. (2d) 391, the state supreme court said:

> "Hence, this case is not *res judicata* against the state of Washington. As we have heretofore pointed out, the city does not have the capacity to act under the license. Its inability to act, in the manner which we have discussed, is inherent in its very nature. *Its inability so to act can be remedied only by state legislation that expands its capacity.*" (Court's emphasis.) (R. 285.)

The state court then distinguished the instant case from the case of *First Iowa Hydroelectric Coop. v. Federal Power Commission* (1946), 328 U. S. 152, and concluded with the following:

> "In the instant case, the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition*; it presents a question of *lack of state statutory power* in the city. It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the state of Washington." (Court's emphasis.) (R. 286.)

Following Tacoma's petition for rehearing, the state supreme court pointed out that its opinion was necessarily limited to the present plan of construction and that it could not give an advisory opinion as to what other plan might be adopted or what the law would be if another plan were adopted, and said:

> "In our review of this case under the declaratory judgment statute (RCW 7.25.010), we are limited in our consideration by the plan of construction established by the ordinances of

the city of Tacoma, and the license the city of Tacoma received from the Federal power commission, as they appear in the record before us. It is not within the province of this court to give an advisory opinion as to what the law may be under a different plan of construction, which may be established by different ordinances or licenses.

"* * *

"We have already held that the question of the capacity of the plaintiff to acquire property of the state of Washington by eminent domain is within the jurisdiction of the court; and that the city of Tacoma has not been endowed with the statutory capacity to condemn state lands previously dedicated to a public use. Without this power, it cannot accomplish the plan set forth in the city ordinances before us; hence, for the reasons we have discussed herein, the judgment of the superior court is affirmed." (R. 370-371.)

The judgment enjoined spending any further sums on the project (R. 261). A stay was granted which allowed expenditures for, among other things:

"* * * the negotiation for possible acquisition or relocation of the Mossyrock Game Fish Hatchery of the State of Washington, expenses for assertion and maintenance of its legal and property rights. * * *" (R. 378.)

In Tacoma Taxpayers' response to the city's petition for rehearing, it is stated that Tacoma contemplated proceeding under an amended plan which would not require the destruction of the state fish hatchery and would, therefore, be within its capacity and power. (R. 346.)

In order to be able to advise the court whether any amendments have been applied for, counsel for the state wrote to counsel for the federal power commission under date of March 21, 1958, and received a reply under date of March 28, 1958. Copies of these letters are attached as Appendix B.

It would appear that no request for amendment has been made, and that the case is here based upon the original plan which requires the destruction of the state fish hatchery.

Tacoma's license appears in the record beginning at page 27 and is reported at 10 Federal Power Commission Reports 424-445. The licensee was required to commence construction of the project within two years from the effective date of the license, which was January 1, 1952 (R. 160).

This date was extended by order of the commission to December 31, 1955 (R. 160).

The Federal Power Act, Title 16 U. S. C. § 806, provides that the period for the commencement of construction under a license may be extended once but not longer than two additional years.

Tacoma has therefore had this maximum extension.

Article 28 of Tacoma's license requires the completion of the project within thirty-six months from commencement of construction (R. 45). Construction was started on the Mayfield dam on June 23, 1955 (R. 253).

SUMMARY OF ARGUMENT

The judgment of the state court below should be affirmed for reasons summarized as follows:

It is apparent that the project involved in this case cannot be completed by Tacoma within the time prescribed by its license which would require completion by June 23, 1958.

This is of special importance to respondent, Taxpayers of Tacoma, whose counsel will raise the point in a separate brief that the case is now moot.

Of the greatest importance to respondent, State of Washington, and all other states, is the maintaining of the states' sovereign right to fix the capacity and power of cities created for the purpose of discharging sovereign functions of state government; or more precisely, to protect the rights of a sovereign state from invasion by another sovereign without the consent and against the will of the state.

Amicus curiae, federal power commission, on page 16 of its brief, sets forth certain statements which should be considered in order to define clearly the decision of the state supreme court.

First, it is stated that the court recognized that its decision operated to prevent the construction of the federally-licensed project. Actually, the state supreme court pointed out that it dealt only with the existing license and the existing plan of construction. The project, of course, could be completed by the City of Tacoma under a new license or an amended

license, if that could be obtained, on a plan (considered by it) which would not destroy the state fish hatchery and would, therefore, be within its capacity and power to act, or it could be completed under a new license issued to a new applicant having capacity and power to act.

Again, *amicus curiae* states that the state fish hatchery could probably be adequately relocated. This assumption was taken from Tacoma's argument and is unfounded. The state game commission in the discharge of its duties found that it could not be relocated, and the state legislature, in refusing power to condemn, must also have found that it could not be relocated and was necessarily operated as a part of the state government.

The court will accept these administrative and legislative findings.

On page 17 of its brief, *amicus curiae* argues that the Federal Power Act should be construed so as to authorize condemnation of "state lands previously held for public use." This would imply that the state fish hatchery is not now being operated. Actually, the state game commission formally found that the state fish hatchery was being operated and had been operated since 1941, and that (1) no adequate alternate site could be found, (2) the operations were indispensable, and (3) the hatchery would be required for a period of years before any beneficial data could be obtained. (R. 175.)

The question before the state supreme court was, therefore, whether the City of Tacoma could condemn an instrumentality of the state government, which had been found to be indispensable and necessary as such, without having complied with the statutory steps for the acquisition of such property and in the absence of statutory authorization so to do.

The state supreme court held that Tacoma did not have that capacity and power. This decision of the state supreme court will be accepted by this court. 28 U. S. C. § 1652. Respondents will, therefore, not set forth in this brief the prior decisions of the Washington state supreme court which adequately support its judgment.

On June 21, 1955, notwithstanding the admonition of District Judge George H. Boldt dated June 15, 1955, as to the effect of the Federal Power Act, Tacoma, without having complied with statutory procedure and before an adjudication of its rights in the instant case, sold certain bonds and on June 22, 1955, awarded contracts for the construction of one of the dams.

The State of Washington immediately and on June 24, 1955, sought to enjoin this procedure, and in so doing pointed out that Tacoma had not claimed the right to condemn the state fish hatchery and did not have the right so to do.

Thus the question of the right to condemn the fish hatchery was raised by the state itself at the

earliest possible opportunity. That question could not have been presented to the federal power commission, which was without authority to decide it if it could have been presented, and was expressly excluded from consideration by the United States court of appeals for the ninth circuit in its review of the federal license in *State v. Federal Power Commission* (1953), 207 F. (2d) 391. It was properly considered and decided when raised in the instant case.

The Federal Power Act does not specifically authorize the condemnation of state property.

The federal power commission may in any event not authorize a branch of the state government to injure its creator, the state government, by destroying an instrumentality which the state government finds to be necessary, especially where the state legislature has expressly denied that right.

ARGUMENT

The real question was correctly decided by the state supreme court.

The state supreme court stated the question to be the capacity of Tacoma to condemn state lands necessarily devoted to governmental purposes.

The supreme court, of course, knew the question it was deciding. Tacoma knew the question it was deciding, and when the state supreme court decided it, took steps to seek the right to condemn the state fish hatchery by securing introduction in the state senate of Senate Bill 264 (App. A). Tacoma as peti-

tioner here, however, on page 4 of its brief, makes the unwarranted statement:

> "The real contest, however, is not over the hatchery, but the dams. * * * If the hatchery were being taken for some use not related to construction of a power dam, this case would not necessarily be here. * * *"

The state game commission found the hatchery to be indispensable and irreplaceable and would have opposed its destruction for any purpose. The state supreme court struck down every law which would tend to prevent the construction of a dam by a licensee with the capacity and power to act under the federal license.

It was Tacoma's lack of capacity and power to act on this particular plan, which would necessitate the destruction of the state fish hatchery, and that alone, which caused the courts of the state to enjoin the expenditure of funds.

Implicit in the state court's ruling is that petitioner, if licensed, could build a dam on a plan which would not necessitate the destruction of the state fish hatchery.

The question was one of capacity of the city, which is but a part of the state government, to injure the state government without consent of that government.

Let there be no misunderstanding. The ultimate issue in this case is not as stated by petitioner. It is the right of a sovereign state to control its in-

ternal affairs and regulate its own agencies of government.

In the case of *Driscoll v. Burlington-Bristol Bridge Co.* (1952), 8 N. J. 433, 86 A. (2d) 201, 229, the late Chief Justice Vanderbilt, speaking for a unanimous court, said:

> "* * * Quite obviously the Federal Government cannot grant a power to an agency of the State which the State itself has not seen fit to grant. * * *"

This court denied certiorari, 344 U. S. 838, and also denied a rehearing, 344 U. S. 888. Other cases to the same effect are *Burlington County Bridge Commission v. Meyner* (1955), 133 F. Supp. 214, and *Yadkin County v. City of High Point* (1940), 8 S. E. (2d) 470.

It is submitted that the ruling in the instant case should be accepted by this court as was the ruling in the New Jersey case just cited.

The state court, in deciding the instant case, held in essence:

(a) Tacoma, a part of the state government, without having acquired the right so to do, has undertaken a project which will destroy the state fish hatchery, which the state has found to be indispensable to its government.

(b) Tacoma claims the right to do this by eminent domain. This is a state question, our ruling on which will be accepted by the supreme court of the United States. We have consistently held and do now hold that since the applicable state statute does

not specifically grant the right to take or damage state property, that Tacoma has neither capacity nor power to destroy or damage the state fish hatchery.

(c) Tacoma argues that it has received the capacity and power to destroy the state fish hatchery from some federal source, particularly § 21 of the Federal Power Act.

(d) While such an argument violates every prior conception of the independence of the separate sovereignties, we proceed to see if there is a basis for such an argument and find that the Federal Power Act does not specifically mention state-owned property, and, therefore, does not purport to grant the right of eminent domain.

(e) In finding that there is no basis for Tacoma's argument, we are still concerned solely with the capacity of Tacoma, on which question our opinion will be accepted by the supreme court of the United States.

(f) Tacoma, not having capacity to destroy the state fish hatchery, must be enjoined from so doing, although it has the right to build the dam in such a way that the fish hatchery will not be damaged.

It is submitted that the court correctly confined its ruling to a state question, which this court will accept.

Congress simply did not (if it could) say to the State of Washington: "Your economy does not need the fish hatchery." Congress simply did not, in the Federal Power Act, authorize the federal power commission to make this statement, nor did it au-

thorize the federal power commission to authorize Tacoma to make this statement.

Congress simply did not attempt to authorize the federal power commission to tell the sovereign state: "Tacoma may build a dam 185 feet in height (R. 346) and destroy the fish hatchery, whereas state law would allow a dam of from 110 feet to 120 feet in height only, so that it will not destroy the state fish hatchery."

This court has uniformly held that Congress could not have done these things if it tried. Congress is prohibited by the constitution from exerting municipal sovereignty over the internal affairs of any state. See *Pollard v. Hagan* (1845), 3 How. 212.

Section 21 of the Federal Power Act, not purporting to grant the power of condemnation of state property specifically, does not confer the power to condemn state property already devoted to a conflicting public use.

Footnote 13 in the case of *U. S. v. Carmack* (1946), 329 U. S. 230, 243, points out the distinction between the unlimited sovereign power of eminent domain when exercised by the government on its own behalf and the limited powers of a public utility licensee, in the following words:

> "* * * A distinction exists, however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers. They do not include sovereign

powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers. *In such cases the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority.* See *United States v. Jotham Bixby Co.*, 55 F. 2d 317, 319, affirmed *sub nom., C. M. Patten & Co. v. United States*, 61 F. 2d 970, decree vacated as moot, 289 U. S. 705; *In re Condemnations for Improvement of Rouge River*, 266 F. 105; *United States v. City of Tiffin*, 190 F. 279, 281." (Emphasis supplied.)

The state supreme court's ruling in the instant case is in accord.

In *Gibbons v. Ogden* (1824), 9 Wheat. 1, 195, this court said:

"* * * The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. * * *"

Had Congress intended to endow the City of Tacoma with the power to destroy the state fish hatchery, it would certainly have been an unauthorized exercise of sovereignty over the internal affairs of the State of Washington.

In *Tarble's Case* (1871), 13 Wall. 397, 406, this court said:

"* * * There are within the territorial

> limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. *Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other.* * * *" (Emphasis supplied.)

Tacoma is simply a part of the government of the State of Washington, and its powers are derived solely from the state, may be enlarged, abridged or entirely withdrawn by the state legislature at its pleasure. The absolute right to control exclusively their respective municipal corporations is reserved to the states under the tenth amendment to the United States constitution.

In *City of Trenton v. New Jersey* (1923), 262 U. S. 182, 187, the court said:

> "In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self government which is beyond the legislative control of the State. A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will. See *Barnes v. District of Columbia*, 91 U. S. 540, 544, 545."

In *U. S. v. Council of Keokuk* (1867), 6 Wall. 514, 516, this court held that "it is quite clear" that all the rights, duties, and obligations of a municipal

corporation must be ascertained and defined by the laws of the state of its creation.

In *Chicago v. Fieldcrest Dairies* (1942), 316 U. S. 168, 172, which involved a dispute between the city and its sovereign creator, this court said:

> "* * * Furthermore, the dispute in its broad reach involves a question as to whether a city has trespassed on the domain of a State. * * * The delicacy of that issue and an appropriate regard 'for the rightful independence of state governments' (*Beal v. Missouri Pacific R. Co.*, 312 U. S. 45, 50) reemphasize that it is a wise and permissible policy for the federal chancellor to stay his hand in absence of an authoritative and controlling determination by the state tribunals. * * *"

It is respectfully submitted that the determination of the state supreme court in the instant case should be treated as authoritative and controlling and should be affirmed.

ARGUMENT IN ANSWER TO PETITIONER AND AMICUS CURIAE

On page 24 of the brief filed on behalf of the federal power commission appears this sentence:

> "* * * We submit that an essential aspect of this power is that the United States may delegate it to agents of its own choosing, including state-created entities."

The state assumes that counsel did not mean to imply that the federal power commission deliberately canvassed the agencies, private and public, in the State of Washington in order to pick one which it chose as most proper to file an application. The

state also assumes that the federal power commission will do its duty when and if any applicant, including the City of Tacoma, might file any application for an original permit or amendment thereof.

It is quite evident also that in referring to "state-created entities" counsel for *amicus curiae* intended to limit their statement to those entities created under state laws, such as public utility districts, authorized by state law for the express purpose of constructing utilities, and did not intend even to imply that the federal power commission could delegate sovereign powers to the sovereign state or any city or commission through which the sovereign state exercises its governmental functions.

The cases cited by counsel for petitioner and counsel for *amicus curiae* do not sustain any such contention and do affirmatively hold that the power of the sovereign state may not be invaded.

Counsel for petitioner and counsel for *amicus curiae* imply or argue that the decision of the state supreme court on the capacity of the City of Tacoma under state law is wrong.

The state assumes that in the words of this court, such a decision is "authoritative" and will be accepted by this court. Should this court wish the question of state law briefed, the state will gladly furnish such a brief.

Chapter 374, Laws of Washington for 1955, is an example of how a city desiring to take property used by another agency of the state government

(state park commission) is granted authority so to do.

In that chapter the legislature of the State of Washington authorized the City of Spokane to condemn a portion of a state park for sewer disposal purposes, providing, however, that this authority could be exercised only "after notice and public hearing on the selection of said site."

In the instant case the legislature of the State of Washington has denied to the City of Tacoma at this time the power to take property being used by another branch of the state government, the state game commission.

It would unduly extend the length of this brief to analyze the numerous cases cited in the briefs of petitioner and *amicus curiae*. None of them affords any basis for the argument that the federal government or the federal power commission could interfere in the internal affairs of the sovereign state, let alone decide what branch of the state government should put what property of the state to what public use.

In none of the cases cited by petitioner or *amicus curiae* was a state-created entity, which had been expressly denied the power of injuring its creator, the state, involved.

The State of Washington, of course, does not deny that the United States has inherent sovereign power to condemn property necessary for its own

use, but counsel for petitioner and *amicus curiae* ignore the distinction between that power and the limited and strictly construed power of eminent domain enjoyed by public utilities, especially where that power is sought to be exercised to acquire property already devoted to a public use.

Counsel also ignore the basic fact that the sovereignty of the United States may not be transferred to the state, and the sovereignty of the state may not be transferred to the United States.

In *U. S. v. Jones* (1883), 109 U. S. 513, 518-519, this court said:

> "* * * The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and, as said in *Boom v. Patterson*, 98 U. S. 106, requires no constitutional recognition. * * * It is undoubtedly true that the power of appropriating private property to public uses vested in the general government—its right of eminent domain, * * * * cannot be transferred to a State any more than its other sovereign attributes; * * *"

It is equally certain and conclusive that the federal power of eminent domain cannot be conferred on a municipal corporation through which the state exercises its governmental functions. That would be conferring of a portion of the sovereignty of the United States on the state. For a stronger reason it is apparent that the right to injure the state government or another branch of the state government cannot be conferred, except by the sovereign state which necessarily regulates its own affairs.

In *Linder v. U. S.* (1925), 268 U. S. 5, 17-18, this court said:

> "* * * And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced. *McCulloch v. Maryland*, 4 Wheat. 316, 423; *License Tax Cases*, 5 Wall. 462; *United States v. DeWitt*, 9 Wall. 41; *Keller v. United States*, 213 U. S. 138; *Hammer v. Dagenhart*, 247 U. S. 251; *Child Labor Tax Case*, 259 U. S. 20. In the light of these principles and not forgetting the familiar rule, that 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score,' the provisions of this statute must be interpreted and applied."

First Iowa Hydroelectric Coop. v. Federal Power Commission (1946), 328 U. S. 152, 178, points out the intent of Congress, in passing the Federal Power Act, to protect the constitutional rights of the states. The court therein said:

> "When this application has been remanded to the Commission, that Commission will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of the legal title of the applicant to its riparian rights, or as to the validity of its local franchises, if any, relating to proposed intrastate public utility service. Section 9 (b) says that the Commission may wish to have 'satisfac-

> tory evidence' of the progress made by the applicant toward meeting local requirements but it does not say that the Commission is to assume responsibility for the legal sufficiency of the steps taken. The references made in § 9 (b) to beds and banks of streams, to proprietary rights to divert or use water, or to legal rights to engage locally in the business of developing, transmitting and distributing power neither add anything to nor detract anything from the force of the local laws, if any, on those subjects. * * *"

At this point we take the liberty of recapitulating the holdings of this court in the decisions we have cited.

The power to regulate purely internal affairs has been retained by the states and never surrendered to the federal government; Congress cannot exercise municipal sovereignty over the internal affairs of a state; it is a question of local law what shall be the extent and character of the power of a state municipal corporation; such state municipal corporation is a part of the civil government of a state deriving its existence and power solely from its creator, the state legislature; such state municipal corporation cannot claim privileges or immunities under the federal constitution against its creator, the state.

Certainly it was not the intent of Congress, in enacting § 21 of the Federal Power Act (16 U.S.C. § 814), to confer on the City of Tacoma, a municipal corporation, a power to injure the state by damaging property already devoted to a governmental use

where that power has been expressly denied it by the state.

Grand River Dam v. Grand-Hydro (1948), 335 U. S. 359, 374, involved condemnation by a public utility, which right it must be noted the public utility enjoyed by virtue of state law. As to the impact of the Federal Power Act on this state right of condemnation, the court said:

> "* * * As to the question whether the Federal Power Act should be interpreted as actually superseding the state law of condemnation and as restricting the measure of valuation which lawfully may be used by the courts of Oklahoma in a condemnation action for the acquisition of land for power site purposes by an agency of that State, there is nothing in the Federal Power Act to indicate that an attempt has been made by Congress to make such a nationwide change in state laws."

In the instant case the state supreme court decided that Tacoma did not have capacity to accept a federal grant of right. In *Latinette v. City of St. Louis* (1912), 201 Fed. 676, 677, the courts of the parent state, Missouri, decided that the City of St. Louis had the capacity to accept a federal grant.

The state supreme court was correct in deciding that the question of the capacity of the City of Tacoma was not *res judicata* against the State of Washington. (R. 285.)

The circuit court of appeals for the ninth circuit, in reviewing the permit involved in this case, specifically held that questions of capacity might have

been inquired into by the federal power commission "as relevant to the practicability of the plan, but the Commission has no power to adjudicate them." *State of Washington Department of Game v. Federal Power Commission* (1953), 207 F. (2d) 391, 396.

The circuit court of appeals for the ninth circuit specifically held that it did not "touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted." That court recognized that questions of capacity of the licensee were state questions, and by footnote 15a at the bottom of page 397 referred to the instant case, which was then pending before the supreme court of the State of Washington.

If the question of the capacity of the City of Tacoma could have been presented either to the federal power commission or to the court of appeals for the ninth circuit when it reviewed the license, it could not have been decided by either tribunal, and, therefore, the doctrine of *res judicata* could not apply.

However, the question of the capacity of the City of Tacoma could not have been presented to either tribunal for it had not arisen and did not arise until a later date. When the application for permit was before the federal power commission, that commission must have found that the state statutes provided an orderly way for the acquisition of state property. No one could or would assume that the City of Tacoma would at a later date abandon the statutory method of acquiring state property and start work

on the project without having acquired the right to damage the state fish hatchery. Then for the first time the question of Tacoma's capacity arose. It was promptly raised by the state and properly decided by the state court.

CONCLUSION

Petitioner, City of Tacoma, asked the state supreme court for a rehearing. (R. 313-344) In this petition for rehearing it set forth numerous situations which could exist and asked for an advisory opinion, which the state court could not grant, being confined to the status of the present license. (R. 370)

Since it has become impossible for petitioner to construct the project under the existing license, and since a new or amended license is now necessary, it would appear that appellant city should:

(a) Reapply to the state game commission to see if it is now possible to replace all or some of the state fish hatchery. (In August, 1955, the game commission found that there would be a necessity for the hatchery for a period of years before any beneficial data from previous experiments could be obtained.)

(b) Make a proper application to the federal power commission advising it for the first time of the facts.

It is respectfully submitted that the decision of the state supreme court should be affirmed.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

PHILIP R. MEADE,
Assistant Attorney General,

Attorneys for Respondent Directors and State.

APPENDIX A

IN THE SENATE. By SENATORS JACKSON, DIXON and HAPPY.

Senate Bill No. 264

STATE OF WASHINGTON, THIRTY-FIFTH REGULAR SESSION.

Read first time February 8, 1957, ordered printed and referred to Committee on Public Utilities.

AN ACT

Authorizing the city of Tacoma to acquire certain state lands in the county of Lewis, state of Washington; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. The city of Tacoma is hereby authorized to acquire for use in connection with the construction and development of two dams on he Cowlitz river those state lands which are located within the county of Lewis, state of Washington and the project boundaries of the federal power commission license issued to the city of Tacoma, known as federal power commission project No. 2016, under the existing provisions of Washington state laws. Where no such provisions are provided then the compensation shall be determined under the provisions of RCW 8.12: *Provided*, That in connection with the acquisition of the department of game fish hatchery located at Mossyrock, Washington, the city of Tacoma shall first negotiate for a period of sixty days with the department of game for relocation or replacement of said hatchery upon terms mutually agreeable to the

department of game and the city of Tacoma; in the event that an agreement cannot be reached within that period of time, then the compensation to be paid for the acquisition of the portion of the hatchery necessary to project 2016, shall be determined under the provisions of RCW 8.12. The acquisition, relocation or replacement of said hatchery shall be in addition to the requirements for fish facilities set forth in article 31 of federal power commission license No. 2016.

SEC. 2. This act is necessary for the immediate preservation of the public peace, health and safety, and shall take effect immediately.

EXCERPTS FROM LEGISLATIVE RECORD, 1957 SESSION

"S. B. No. 264—By Senators Jackson, Dixon and Happy—An Act authorizing the city of Tacoma to acquire certain state lands in the county of Lewis, state of Washington; and declaring an emergency.

"Read first time February 8, referred to Committee on Public Utilities.

"Reported back February 20, with recommendation that Substitute S. B. No. 264 be substituted therefor and the substitute bill do pass majority; minority, do not pass.

"Sub. S. B. No. 264—By Public Utilities Committee—An Act authorizing any political subdivision of the state to acquire by purchase or condemnation certain state lands in Lewis county; making provision for replacement of fish hatchery facilities; and declaring an emergency.

"Read first time February 20, passed to Committee on Rules and Joint Rules for second reading.

"Read second time February 26.

"Passed to third reading.

"Read third time February 26, failed to pass; yeas, 19; nays, 27; absent, 0.

"On motion February 27, reconsidered and passed; yeas, 26; nays, 20.

"House Action

"Read first time February 28, referred to Committee on Fisheries.

"Reported back March 10, majority, do not pass; part, without recommendation; part, do pass.

"Passed to second reading.

"Read second time March 11, amended.

"Passed to third reading.

"Read third time March 12, failed to pass; yeas, 46; nays, 53; absent, 0.

"On motion March 12, reconsidered, failed to pass; yeas, 49; nays, 50; absent, 0."

APPENDIX B

March 21, 1958

Mr. Howard E. Wahrenbrock
Solicitor

Federal Power Commission
Washington 25, D. C.

Re: City of Tacoma v. Taxpayers, et al.
USSCt No. 509, October Term, 1957
A. G. File No. 15407

Dear Sir:

Reference is made to your letter of January 13, 1958, in which you courteously promised that you would furnish us with copies of such filings as we may need in connection with this case.

We are concerned with the status of the license held by the City of Tacoma, with particular refer-

ence to time limitations, and would appreciate it very much if you would furnish us with a copy or advise us of the contents of any order or ruling reflecting the status of this case in that particular.

Is the record in such shape that at the termination of this litigation the City of Tacoma could make application for an amendment of its license to conform with court rulings?

We are engaged in the preparation of respondents' brief and would appreciate it very much if you would favor us with an air mail reply. We will, of course, as you request, furnish you with copies of our brief when prepared, and on our part will be glad to furnish you with any information you may need.

Respectfully,

JOHN J. O'CONNELL
Attorney General,

/s/ E. P. DONNELLY
Assistant Attorney General,

EPD:dg
cc: Hon. J. Lee Rankin

FEDERAL POWER COMMISSION
WASHINGTON 25

Project No. 2016
City of Tacoma, Washington

March 28, 1958
AIR MAIL

Mr. E. P. Donnelly
Assistant Attorney General
State of Washington
Olympia, Washington

Dear Mr. Donnelly:

This will acknowledge receipt of your letter of March 21, 1958 requesting (1) the status of the license for Project No. 2016 of the City of Tacoma, and (2) asking whether the record is in such shape that the City could make application for an amendment of its license to conform with court rulings.

The Commission's opinion and order issuing license to the City of Tacoma are reported at 10 F.P.C. 424-445. The license for Project No. 2016 is still outstanding. However, as a result of the judgment of the Washington Supreme Court (49 Wn. 2d 781) the City is presently enjoined from spending any more money on the project.

It would appear that your second question could not be answered prior to termination of the litigation and until after such application for amendment is filed.

Very truly yours,

/s/ J. H. GUTRIDE
Secretary

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No. 509

In the Supreme Court of the United States

OCTOBER TERM, 1957

CITY OF TACOMA, PETITIONER

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

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In the Supreme Court of the United States

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BRIEF FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

OPINIONS BELOW

The original opinion of the Washington Supreme Court and that on rehearing (Pet. App. A 1a–48a) are reported at 49 Wn. 2d 781.

JURISDICTION

The judgment of the Washington Supreme Court was entered on April 30, 1957 (Pet. App. E. 126a). A petition for rehearing was denied on April 30, 1957 (Pet. App. F 131a). By order of Mr. Justice Black dated July 22, 1957 (Pet. App. G 132a), the time for filing a petition for a writ of certiorari was extended to and including September 27, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTION PRESENTED

The Federal Power Commission issued to the City of Tacoma, a municipal corporation in the State of Washington, a license under the Federal Power Act for the construction and operation of a hydroelectric development on the Cowlitz River. In order to construct the project thus authorized, Tacoma will have to condemn a fish hatchery owned and operated by the State of Washington for public purposes. The main question presented is:

Whether Section 21 of the Federal Power Act, authorizing licensees under the Act to condemn property necessary for the project, vests the requisite power in Tacoma to condemn the fish hatchery notwithstanding Tacoma's asserted lack of power and capacity under state law to condemn such property.

STATUTE INVOLVED

Section 21 of the Federal Power Act, 41 Stat. 1063, 1074, 16 U. S. C. 814, provides in pertinent part:

> * * * When any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court

of the United States for the district in which such land or other property may be located, or in the State courts. * * *

STATEMENT

The relevant facts may be summarized as follows:

Prior proceedings.—In 1951, the Federal Power Commission granted a license under the Federal Power Act to the City of Tacoma, a municipal corporation in the State of Washington, authorizing it to construct and operate a hydroelectric project on the Cowlitz River, a tributary of the Columbia River in Washington. The proposed project was to comprise two developments: (1) the Mossyrock development, about 65 miles up the Cowlitz, was to consist of a dam, about 510 feet high, which would create a reservoir extending about 21 miles upstream with a usable storage capacity of 824,000 acre-feet of water, and a power house with an initial installation of three units, each having 75,000 kilowatts of capacity, and provision for a fourth unit of the same capacity; (2) the Mayfield development, about 52 miles from the Cowlitz mouth, was to consist of a dam, about 240 feet high, which would create a reservoir 13½ miles long extending up to the Mossyrock dam, with a usable storage capacity of 21,000 acre-feet and a powerhouse with an initial installation of three units, each with a 40,000 kilowatt capacity, and provision for an additional unit of the same capacity. In the initial installation, the dependable capacity would be about 275,000 kilowatts, with an average annual output of 1,400 million kilowatt hours.

In granting the license, the Commission found that, in addition to providing substantial flood control, navigation, and recreational benefits, the project would assist greatly in alleviating the severe power shortage in the Northwest Region—a matter of national concern—and that none of the projects suggested for construction in lieu of the Cowlitz Project could be constructed as quickly or economically. Thus, the Commission found that the project would be an exceptionally valuable addition to the Northwest power supply because of its size (it will add 190 per cent to the present capacity of Tacoma's generating plants and nearly ten per cent to the combined total installation in the Pacific Northwest power pool); location (it is to be on the west side of the Cascade Mountains where the power shortage is most acute and near the densely populated areas of Tacoma, Seattle, and Portland); and the characteristics of its power output (the diversity of stream flow, due to the Cowlitz's flow being high when the Columbia flow is low, will make large blocks of power available at the regional peak demand, thereby increasing the flexibility of the Northwest power pool), 10 F. P. C. 424–445; 92 P. U. R. (N. S.) 79 *ff*, Pet. App. C 81a *ff*.[1]

[1] The Commission went to exceptional lengths to make sure that the fisheries resources of the Cowlitz would be protected to the fullest extent possible, requiring an initial investment of $9,400,000 and annual expenditures of around $610,000 for this purpose, together with close cooperation between the City of Tacoma and the State and Federal fishery agencies. In addition, the Commission, as special conditions of the license, required that additional studies, test and experiments as to the various fish protective devices be made in cooperation with the United States Fish and Wildlife Service and the Departments

The Washington Department of Game and Fisheries had opposed the granting of the license before the Commission and, when the Commission granted the license, the Department sought review in the Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed, ruling that the Commission's findings as to the necessity of the project to alleviate the power shortage, and the effectiveness of the proposed facilities to protect the fish in the Cowlitz River, as well as the finding that the Cowlitz Project was best adapted to a comprehensive plan for developing the river, were supported by substantial evidence and therefore conclusive. *State of Washington Dept. of Game* v. *Federal Power Commission*, 207 F. 2d 391 (Pet. App. D 112a–124a). Answering the Game and Fisheries Department's argument that Tacoma, as a creature of Washington, "cannot act in opposition to the policy of the State or in derogation of its laws" (see 207 F. 2d at 396), the Ninth Circuit commented (*ibid.*; Pet. App. D 120a):

> Again, we turn to the First Iowa case [*First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152]. There, too, the applicant for a federal license was a creature of the state and the chief opposition came from the state itself. Yet, the Supreme Court permitted the applicant to act inconsistently with the declared

---

of Fisheries and Game of the State of Washington prior to permanent construction of such facilities; that the studies and investigation with respect to the program of stream improvement and hatchery facilities be continued; and that only those facilities as may be prescribed thereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior be constructed.

policy of its creator, and to prevail in obtaining a license.[2]

This Court denied certiorari. 347 U. S. 936.

While the Ninth Circuit proceeding was still pending, Tacoma sought in the state courts a declaratory judgment as to validity of the proposed issue of bonds up to $146,000,000 to finance the construction of the project. Opposing, the Department of Game and Fisheries urged *inter alia* that the City "being a municipal corporation created by the state, may not defy the laws of its creator. In other words, assuming that [the City] ever had the power to construct dams on rivers resulting in the destruction of fish life, it is contended that the legislature has taken that right away with respect to the Cowlitz river by enacting the fish sanctuary act (Chap. 9, Laws of 1949)." In rejecting this argument in a divided decision, 43 Wn. 2d 468, the Washington Supreme Court, after analyzing the pertinent materials, concluded (43 Wn. 2d at 492; Pet. App. B 74a–75a):

> The Federal power act defines the term municipal corporation and authorizes the

[2] The Ninth Circuit continued (*id.* at 396–397; Pet. App. D 121a):

> Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States. However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them.

> power commission to issue a license to such an entity. Appellant has complied with the state law with respect to the right of a municipality to engage in the business of developing, transmitting and distributing power. Having been granted a license by the power commission, we hold that appellant is at the present time in the same position as any other licensee under the act. * * *

Accordingly, since the case was before it on the granting of a demurrer to Tacoma's complaint, the cause was remanded for further proceedings.

Present proceedings.—In the course of the complicated proceedings following the remand, the Director of Game and Fisheries moved in the trial court on June 24, 1955, for a temporary restraining order and injunction *pendente lite,* to enjoin Tacoma from continuing the development and construction of the project as it had undertaken to do (R. 111–112; see Pet. App. A 3a–5a). Thereafter, the State of Washington, in its sovereign capacity, was added as a party defendant on the Director's motion, and for the first time the defendants raised the issue as to Tacoma's power, as a municipality of the State of Washington, to condemn the state-owned Mossyrock fish hatchery and the adjoining land, operated by the Game and Fisheries Department and located within the Mayfifield reservoir site (see Pet. App. A 6a). Tacoma's reply denied that it lacked the requisite power to condemn these properties under the "laws of the United States" (R. 262, 203–204,

239).[3] The trial court ruled that it lacked jurisdiction to pass on Tacoma's eminent domain authority; however, it held that Tacoma was acting illegally in constructing the project since it would interfere with public navigation contrary to state law; consequently, the court enjoined Tacoma from spending any more money on the project (see Pet. App. A 9a). Both sides appealed.

In another divided decision, a new majority of the Washington Supreme Court, after holding, among other things, that, despite the absence of a condemnation proceeding, the question of Tacoma's power to condemn the fish hatchery was properly before it (Pet. App. A 11a), ruled that Tacoma did not have power to condemn such land owned and used by the state for public purposes. In so holding, the Washington court reasoned as follows: "A municipal corporation does not have an inherent power of eminent domain. It may exercise such power only when it is expressly authorized to do so by the *state legislature*" (italics in original; Pet. App. A 15a). Statutes making such a delegation to a municipality are to be strictly construed (Pet. App. A 16a). There are several prior decisions to the effect that references in railroad condemnation statutes to lands granted to the state do not include state lands segregated from the public domain and appropriated to a public use (Pet. App. A 17a). Accordingly, the state statutes au-

[3] Tacoma had repeatedly offered to buy the hatchery and relocate it with greatly improved facilities at a level above the reservoir, but the State, after finding administratively that the hatchery was "irreplaceable," had rejected the offers.

thorizing municipal corporations to operate public utilities and to condemn property in connection therewith do not authorize Tacoma to condemn state-owned property previously dedicated to a public use (Pet. App. A 17a–18a). The court concluded that "the city of Tacoma has not been endowed with the statutory capacity to condemn such lands" (Pet. App. A 18a) and "[*i*]*ts inability so to act can be remedied only by state legislation that expands its capacity*" (italics in original; Pet. App. A 19a).

As to the effect to be given to the license issued by the Federal Power Commission, the court was of the view (Pet. App. A 20a):

> * * * the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition*: it presents a question of *lack* of *state statutory power* in the city. It does not present a Federal question: it presents a question peculiarly within the jurisdiction of the state of Washington.
>
> The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal power act, as we read it, does not purport to do so. [Italics in original.]

And since the question was not "of the right of the Federal government to control all phases of activity on navigable streams, nor a question of its power, under the Federal power act, to delegate that right" (Pet. App. A 18a), the court regarded its ruling as not inconsistent with either the earlier Ninth Circuit decision or this Court's decision in *First Iowa Coop.*

v. *Federal Power Commission*, 328 U. S. 152 (Pet. App. A 19a).

On those grounds, the court affirmed the injunction against Tacoma's construction of both dams (Pet. App. A 21a).

REASONS FOR GRANTING THE WRIT

1. The ruling by the Washington Supreme Court—that, despite the Federal Power Commission's grant of a license to Tacoma and the authorization contained in Section 21 of the Federal Power Act, the city could not condemn the state-owned Mossyrock fish hatchery since, as a creature of the state, its capacity and power to condemn under state law did not extend to state-owned property dedicated to a public use—raises an important and general problem in the development of the nation's water-power resources and the administration of the Federal Power Act. For, as the Washington Supreme Court recognized on rehearing (Pet. App. A 21a), the result of its ruling would be to prevent the construction of a project which the Commission found, in granting a license to Tacoma, would most expeditiously and economically assist in alleviating the acute power shortage not only in Washington but in the entire Pacific Northwest area. Moreover, since the power to acquire property by eminent domain is of critical importance to the construction of hydroelectric projects, the court's ruling will open to the states an easy avenue for asserting a veto power over the Commission's grant of licenses to municipal and public corporations, in the teeth of the preference which Section 7 (a) of the Power Act requires the Commission to

give to applications for licenses by states and municipalities. As a result, that preference clause would lose much of its effectiveness, for the Commission, confronted with the potential inability of municipal corporations otherwise authorized under state law to proceed under a license, would often have little choice but to grant the license to private power companies which presumably would not be subject to the special rule espoused by the Washington court for municipalities.

2. (*a*). Having held that, under state law, Tacoma lacked power and capacity to condemn state-owned property dedicated to a public use, the Washington court appeared to conclude that the license granted by the Commission, together with Section 21 of the Power Act, was insufficient to enable Tacoma to condemn the property.[1] This ruling is, in our view, an erroneous reading of federal law.

Assuming that the court properly held that, as a state matter, Tacoma lacked such condemnation power, it nevertheless seems clear that a grant by the Federal government to a state-created instrumentality, for the purpose of enabling it to carry out federally-authorized functions, is effective to bestow the requisite power. As this Court said in *Seaboard Air Line Railroad Co.* v. *Daniel*, 333 U. S. 118, with regard to the

[1] The opinion below does not make it clear whether the Washington court was holding that Section 21 could not effectively confer *power* to condemn upon Tacoma unless Tacoma also had such power from the state, or whether it was holding that, although Section 21 conferred the power, Tacoma lacked the requisite *capacity* under state law to exercise the granted power. The latter alternative is discussed *infra*, pp. 19-23.

last sentence of Section 5 (11) of the Interstate Commerce Act[5] (333 U. S. at 126–127):

> * * * Although the sentence bars creation of a federal corporation, it clearly authorizes a railroad corporation to exercise the powers therein granted over and above those bestowed upon it by the state of its creation. These federally conferred powers can be exercised in the same manner as though they had been granted to a federally created corporation. See *California* v. *Central Pacific R. Co.*, 127 U. S. 1, 38, 40–5. Here, just as a federally created railroad corporation could for federal purposes operate in South Carolina, so can this Virginia corporation exercise its federally granted power to operate in that State.

This general principle is particularly applicable where the Federal Government undertakes to grant the power of condemnation to a state-created instrumentality in connection with its performance of a federally-authorized function. Thus, in *Lafayette* v. *City of St. Louis*, 201 Fed. 676 (C. A. 7), the question related to the power of the City of St. Louis, a Missouri municipal corporation, to condemn land in Illinois for the purpose of building a bridge across the Mississippi River pursuant to a federal statute. Rejecting the argument that the City could not condemn

[5] The last sentence in Section 5 (11) provides: "Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

Illinois property because Illinois had not given it the requisite power, the Seventh Circuit, after pointing out that the construction of the bridge and of its necessary approaches were matters of national concern, ruled (201 Fed. at 678–679):

> * * * that the nation had the right itself to build and maintain the bridge and approaches, and, for the purpose of acquiring land for the approaches, to exercise the power of eminent domain either directly or through a corporation created by it for that end, without the consent or over the objection of the state—are propositions too well settled to warrant elaboration or debate. * * * Contention is therefore narrowed to this: That Congress could not constitutionally select appellee as the agency through which a national power should be exercised. Nothing in the Constitution forbids the selection of a state corporation as a national agent. *In reason the material thing is the principal's authority, not the parentage or birthplace of the agent.* * * * [Emphasis added.]

Also very close to the present situation is *State of Missouri v. Union Electric Light & Power Co.*, 42 F. 2d 692 (C. D. Mo.), where the state sought to enjoin a licensee under the Federal Power Act from constructing the authorized project because it would inundate many public highways, schools districts, and a county courthouse. In considering whether the eminent domain power delegated by Section 21 of the Act embraced property already dedicated to a public use, the court commented (42 F. 2d at 698):

> * * * the proposed improvements could not be accomplished, except through the exercise, if

> necessary, of eminent domain against property already dedicated to public use. To deny the right of eminent domain as against this public property would not only defeat the functions of the national government, but would run contrary to the obvious intent of the Congress as expressed in the Water Power Act. * * *

And in *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9 (D. N. J.), where the Attorney General of New Jersey sought to enjoin the construction by the railway, a New York corporation, of a railway bridge authorized by a federal statute from New Jersey to Staten Island, New York, Justice Bradley, in a classic opinion written while on circuit, affirmed "the capacity and right" of the railway to construct the bridge in New Jersey, ruling (32 Fed. at 14–15):

> At all events, if congress, in the execution of its powers, chooses to employ the intervention of a proper corporation, whether of the state, or out of the state, we see no reason why it should not do so. There is nothing in the constitution to prevent it from making contracts with or conferring powers upon, state corporations, for carrying out its own legitimate purposes. What right of the state would be invaded? The corporation thus employed, or empowered, in executing the will of congress, could do nothing which the state could rightfully oppose or object to. It may be added that no state corporation more suitable than the defendant could be empowered to build the bridge in question in this case, since one-half of the bridge is in the state of New York, and

the railroad of the defendant is to connect with it on the New York side.[8]

While the condemnation of state property dedicated to public use involved in the *Union Electric* and *Stockton* cases was by a state-chartered private corporation acting under federal authorization, there is no reason why the same principle should not be equally applicable where the condemnation is by a municipal corporation similarly acting under such an authorization.

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[8] Justice Bradley continued (*id.* at 15):

> In our judgment, if congress itself has the power to construct a bridge across a navigable stream for the furtherance of commerce among the states, it may authorize the same to be done by agents, whether individuals, or a corporation created by itself, or a state corporation already existing and concerned in the enterprise. The objection that congress cannot confer powers on a state corporation is untenable. It has used their agency for carrying on its own purposes from an early period. It adopted as post-roads the turnpikes belonging to the various turnpike corporations of the country, as far back as such corporations were known, and subjected them to burdens, and accorded to them privileges, arising out of that relation. It continued the same system with regard to canals and railroads when these modes of transportation came into existence. Nearly half a century ago, it constituted every railroad built, or to be built, in the United States, a post-road. This, of course, involved duties, and conferred privileges and powers, not contained in their original charter. In 1866, congress authorized every steam railroad company in the United States to carry passengers and goods on their way from one state to another, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination. The powers thus conferred were independent of the powers conferred by the charter of any railroad company. Surely these acts of congress cannot be condemned as unconstitutional exertions of power.

For, as stated in *Latinette, supra,* "In reason the material thing is the principal's authority [*i. e.* the Federal Government], not the parentage or birthplace of the agent." See, also, *City of Davenport* v. *Three-Fifths of an Acre of Land,* 147 F. Supp. 794 (S. D. Ill.). And as the court below recognized in its earlier opinion, "[h]aving been granted a license by the power commission, * * * [Tacoma] is at the present time in the same position as any other licensee under the Act" (Pet. App. 74a–75a).

(*b*). Once it is recognized that the Federal Government may validly vest power in a state-created instrumentality, private or municipal, beyond that given it by the state in order to enable it to carry out federally-authorized functions, it becomes clear that Tacoma as a licensee has been given the requisite condemnation power by Section 21 of the Power Act.

It is settled, in the first place, that under the supremacy clause of the Constitution the federal government's power of eminent domain extends to such state-owned property. See, *e. g., Oklahoma* v. *Guy F. Atkinson Co.,* 313 U. S. 508; *United States* v. *Gettysburg Elec. R. Co.,* 160 U. S. 668; cf. *Kohl* v. *United States,* 91 U. S. 367. This has been recently reaffirmed in *United States* v. *Carmack,* 329 U. S. 230, where the Federal Government undertook to condemn, for a post office, state property including a county court house and a city hall (329 U. S. at 236):

> The power of eminent domain is essential to a sovereign government. If the United States has determined its need for certain land for a public use that is within its federal sovereign powers, it must have the right to appropriate that land. Otherwise, the owner of the land,

> by refusing to sell it or by consenting to do so only at an unreasonably high price, is enabled to subordinate the constitutional powers of Congress to his personal will. * * * .

In the Federal Power Act, Congress has undertaken to exercise its authority over interstate commerce including navigable waters. See *United States* v. *Appalachian Power Co.*, 311 U. S. 377; *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152. And, in that Act, it has authorized licensees to exercise the power of eminent domain for the construction and operation of the project for which the license has been granted. Section 21 of the Act, *supra*, pp. 2–3, provides:

> * * * When any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. * * *[7]

[7] "Licensee" as so used includes a municipality such as Tacoma: Section 3 (5) of the Act defines "licensee" as meaning "any person, State, or municipality licensed under the provisions of section 4 of this Act," and Section 3 (7) defines "municipality"

These "federal powers of condemnation vested in licensee[s]" (*First Iowa, supra,* at p. 181, fn. 25) as part of "the federal plan of regulation" (*id.* at p. 181) are ample to vest the requisite power in Tacoma to condemn the fish hatchery. See *State of Missouri* v. *Union Electric Light and Power Co.,* 42 F. 2d 692 (C. D. Mo.). See, also, *United States* v. *Carmack,* 329 U. S. 230; *City of Davenport* v. *Three-Fifths of an Acre of Land,* 147 F. Supp. 794, 799–800 (S. D. Ill.) (where the condemnation statutes were formulated, as here, in general terms, yet held to extend to state-owned property previously dedicated to public use).[8]

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as "a city, county, irrigation district, drainage district; or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power." Tacoma fully satisfies this requirement for, under the Washington law, all classes of municipal corporations have been authorized to operate electric utility systems, including hydroelectric projects. *Hutton* v. *Martin,* 41 Wn. 2d 780; *Tacoma* v. *Nisqually Power Co.,* 57 Wash. 420; see also, Pet. App. B 74a–75a and *supra,* pp. 3–7. As a matter of fact, where a subdivision of a state has been granted a license and has invoked Section 21 to condemn private lands, the propriety of such exercise of eminent domain has generally been accepted without question. See, *e. g., Central Nebraska Public Power & Irrigation District* v. *Harrison,* 127 F. 2d 588 (C. A. 8).

[8] In the court below, respondents relied heavily upon *Federal Power Commission* v. *Niagara Mohawk Power Corp.,* 347 U. S. 239, for the proposition that, whatever its constitutional authority, Congress in the Federal Power Act did not affirmatively grant any rights, but merely gave a "green light" for the exercise of authority already created by another source. But in *Niagara Mohawk,* this Court held only that Congress in Section 27 of the Power Act had not abolished usufructuary rights to water otherwise valid as private property rights under state law. There is nothing in *Niagara Mohawk* in any way bearing on the scope and impact of Section 21.

Should the comparative importance of the old and the new public uses be a factor in determining the propriety of exercising federal eminent domain power to condemn state-owned property already dedicated to public use (see *United States* v. *Carmack*, 151 F. 2d 881 (C. A. 8), reversed, 329 U. S. 230; cf. *City of Norton* v. *Lowden*, 84 F. 2d 663, 665–666 (C. A. 10)), it should be noted that if Tacoma cannot obtain the lands on which the fish hatchery is located and which are needed for its project, it will be unable to construct the project licensed by the Commission—a project which, as already noted, the Commission found would go a long way toward alleviating the acute power shortage in the Pacific Northwest, including but not limited to Washington. See *supra*, p. 4. On the other hand, if Tacoma can condemn the lands on which the fish hatchery is now located, the hatchery can, at a relatively small cost, be relocated within a short distance of its present site (see *supra*, pp. 4, 8.) If a comparison of the relative importance of the two public uses is appropriate, the balance would clearly swing in favor of condemnation for the federal project.

3. If the Washington court meant to distinguish between "capacity" and "power" and, on that basis, to rule that as a matter of state law Tacoma lacked "capacity" to condemn the fish hatchery and therefore could not exercise the federally-conferred authority (see footnote 4, *supra*, p. 11), that holding would be contrary to the principles of federal supremacy. As we show *infra*, pp. 20–23, Washington municipalities have general "capacity" to receive

grants of condemnation power from the state, and therefore there can be no discrimination in this regard against the Federal Government. *Testa* v. *Katt*, 330 U. S. 386, 394.

In addition, such a holding as to "capacity" would appear to be without substantial support in Washington law. In connection with its electric utility business, including its operation of hydroelectric projects, Tacoma undoubtedly has the general capacity to accept grants of authority to condemn needed land, *including state-owned lands*. See Revised Code of Washington 80.40.050, 8.12.030, 80.40.010; *Tacoma* v. *State*, 121 Wash. 448; *Tacoma* v. *Nisqually Power Co.*, 57 Wash. 420; Pet. App. B 73a–74a. Far from distinguishing between capacity and power, the prior Washington decisions, including those cited by the court below, assume the existence of capacity once power or authority has been granted. Thus, not only do the court's quotations from Lewis on *Eminent Domain* and 91 L. Ed. 259 (see Pet. App. A 16a) both deal with the power, not the capacity, of state agencies to condemn state-owned property previously dedicated to public use, but *State* v. *Superior Court*, 91 Wash. 454, and *Seattle & Montana Ry. Co.* v. *State*, 7 Wash. 150 (Pet. App. A 17a), similarly are phrased in terms of power, and not capacity.[9] Both of these cases concerned the authority of railroads to condemn (under state statutes) property al-

[9] In *State* v. *Superior Court*, *supra*, the Washington court stated (at 461): "In the case before us, the question is solely one of power. The question is whether the state has granted to railway companies the right to condemn land which it has reserved and set apart for a public use."

ready dedicated to public use and they merely held that the statutes did not confer power to condemn such property, rulings which plainly are not denials of capacity once authority is shown to have been granted by the State or Federal Government.

Particularly pertinent is *Tacoma* v. *State*, 121 Wash. 448, which the court below cited in its opinion on the prior appeal (see Pet. App. B 74a). In that case, Tacoma sought to condemn certain lands and interests in connection with its construction of another hydroelectric plant. Among the property interests Tacoma wished to condemn were (1) a so-called "eyeing station" which the state owned and claimed that it intended to use as a fish hatchery, (2) some of the waters passing a state-owned fish hatchery then in use, (3) a portion of the lands within a school section owned by the state, and (4) waters presently used by fish for propagation. In upholding the condemnation by the city of all these property interests, the Washington court expressed no concern over Tacoma's capacity to condemn but rather regarded as critical the relative public benefits which would result from the allegedly competing public uses. Thus, as to the "eyeing station," the court commented (121 Wash. at 452):

> The mere fact that the state owns the property and has the right and power to devote it to a public use is not sufficient to prevent the city from diverting the water therefrom, under the broad powers conferred upon cities by our statute, Rem. Compiled Statutes, § 9488, or, in any event, the unfulfilled purpose of the state, indefinite as to time and conditions, must, under

> § 4, ch. 117, p. 448, Laws of 1917 (Rem. Comp. Stat., § 7354), give way to the immediate and definite use proposed by the city.

Similarly, as to the diversion of water past the fish hatchery, the court noted (121 Wash. at 453):

> * * * It may be, as contended by the state, that from the fact that condemnation is sought will flow the presumption of damage to the owner, but if so, it may be only because water is taken which is not used or necessary to be used in carrying out the public purpose to which the property is devoted. However that may be, the evidence disclosed by the record is sufficient to overcome any presumptions, and preponderates to the effect that, after the proposed diversion, there will be ample water in the main stream for the use of the hatchery, and that the diversion will even be a benefit to the hatchery, in that it will reduce the flow in times of high water, which now causes damage. * * *

And, in the same vein, the court held as to the waters used for fish propagation (*id.* at 453–454):

> The contention that the diversion of the waters will destroy or seriously damage the propagation of food fish, we cannot find to be sustained by a preponderance of the evidence. But even if it were, we would be reluctant to hold that the fish, by following their natural instincts, had devoted the stream to such a public purpose as would defeat the city's rights under the statutes hereinbefore cited.

It would thus appear that the prior Washington decisions, construing condemnation statutes as not including state-owned property already dedicated to

public use, were grounded not on the lack of capacity in the condemning agency but rather on the absence of power or authority to condemn. A ruling distinguishing between capacity and authority and holding Tacoma without capacity as a matter of state law, even though adequate power were granted by the Federal Government, would thus be without substantial basis.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari filed by the City of Tacoma in this case should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

CITY OF TACOMA, PETITIONER

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 509

CITY OF TACOMA, PETITIONER

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

OPINIONS BELOW

The original opinion of the Washington Supreme Court and the addition to the opinion (R. 268–313, 369–71) are reported at 49 Wn. 2d 781.

JURISDICTION

The judgment of the Washington Supreme Court was entered on April 30, 1957 (R. 372–73). A petition for rehearing was denied, and an addition to the opinion was filed on a petition for clarification, on April 30, 1957 (R. 371). By order of Mr. Justice Black dated July 22, 1957 (R. 382), the time for filing a petition for a writ of certiorari was extended to and including September 27, 1957. The petition was

filed on September 27, 1957, and was granted on December 9, 1957 (R. 383). The jurisdiction of this Court rests upon 28 U. S. C. 1257 (3).

QUESTION PRESENTED

The Federal Power Commission issued to the City of Tacoma, a municipal corporation in the State of Washington, a license under the Federal Power Act for the construction and operation of a hydroelectric development on the Cowlitz River. In order to construct the project thus authorized, Tacoma will have to condemn a fish hatchery owned and operated by the State of Washington for public purposes. The main question presented is:

Whether Section 21 of the Federal Power Act, authorizing licensees under the Act to condemn property necessary for the project, vests the requisite power in Tacoma to condemn the fish hatchery, notwithstanding the assertion by the State of Washington that under state law Tacoma lacks power and capacity to condemn such property.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act, 41 Stat. 1063, *et seq.*, 16 U. S. C. 791, *et seq.*, and of the Washington statutes are set forth in the Appendix, *infra*, pp. 51–58.

STATEMENT

The Federal License. In 1951, the Federal Power Commission granted a license under the Federal Power Act to the City of Tacoma, a municipal corporation in the State of Washington, authorizing it

to construct and operate a hydroelectric project on the Cowlitz River, a tributary of the Columbia River in Washington (R. 27–48). 10 F. P. C. 424–445; 92 P. U. R. (N.S.), 79 ff. Tacoma has owned and operated facilities for the production, transmission and distribution of electric power, under the authority of state law, since 1893 (R. 89–90).

The proposed project, approved by the Federal Power Commission, was to comprise two developments: (1) the Mossyrock development, about 65 miles up the Cowlitz, was to consist of a dam, about 510 feet high, which would create a reservoir extending about 21 miles upstream with a usable storage capacity of 824,000 acre-feet of water, and a powerhouse with an initial installation of three units, each having 75,000 kilowatts of capacity, and provision for a fourth unit of the same capacity; (2) the Mayfield development, about 52 miles from the Cowlitz mouth, was to consist of a dam, about 240 feet high, which would create a reservoir 13½ miles long extending up to the Mossyrock dam, with a usable storage capacity of 21,000 acre-feet and a powerhouse with an initial installation of three units, each with a 40,000 kilowatt capacity, and provision for an additional unit of the same capacity. In the initial installations, the dependable capacity would be about 275,000 kilowatts, with an average annual output of 1,400 million kilowatt hours (R. 29, 40–42, 6–7).

In issuing the license, the Commission dealt at length with the alleged possible threat to the fisheries resources of the Cowlitz River (R. 22–26, 34–38).

While recognizing that state statutes for the protection of fish could not bar the federal program (R. 20), the Commission's order required Tacoma to establish fish ladders, traps and other facilities in cooperation with state and federal agencies (R. 42, 46).[1]

The Commission found that, in addition to providing substantial flood control, navigation, and recreational benefits, the project would assist greatly in alleviating the severe power shortage in the Northwest Region—a matter of national concern—and that none of the projects suggested for construction in lieu of the Cowlitz Project could be constructed as quickly or economically (R. 18–19, 30–34). Thus, the Commission found that the project would be an exceptionally valuable addition to the Northwest power supply because of its size (it will add 190 percent to the present capacity of Tacoma's generating plants and

[1] The facilities contemplated by the Order with respect to the fishery resources would require an initial investment of $9,465,000 and annual expenditures of about $619,000 (R. 38). In addition, the Commission, as special conditions of the license, required that additional studies, tests and experiments of the various fish protective devices be made in cooperation with the United States Fish and Wildlife Service and the Departments of Fisheries and Game of the State of Washington prior to permanent construction of such facilities; that the studies and investigation with respect to the program of stream improvement and hatchery facilities be continued; and that only those facilities as may be prescribed thereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior be constructed (R. 42, 46).

The Commission noted that, while some of the fish handling facilities proposed by Tacoma were novel, there was strong reason to expect that loss could be avoided (R. 22–26, 36–37, 44–45). In any event, it found that the gain from the power facilities would outweigh any loss to the fisheries (R. 38).

nearly 10 percent to the combined total installation in the Pacific Northwest power pool—R. 18, 30–33); location (it is to be on the west side of the Cascade Mountains where the power shortage is most acute and near the densely populated areas of Tacoma, Seattle, and Portland—R. 18–19, 31); and the characteristics of its power output (the diversity of stream flow, due to the Cowlitz's flow being high when the Columbia flow is low, will make large blocks of power available at the regional peak demand, thereby increasing the flexibility of the Northwest power pool—R. 33).

Prior Proceedings. The Washington Departments of Game and Fisheries had opposed the granting of the license before the Commission and, when the Commission granted the license, the Departments sought review in the Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed, ruling that there was ample evidence to support the Commission's findings as to the necessity of the project to alleviate the power shortage, and the effectiveness of the proposed facilities to protect the fish in the Cowlitz River, as well as its conclusion that the Cowlitz Project was best adapted to a comprehensive plan for developing the river. *State of Washington Dept. of Game* v. *Federal Power Commission*, 207 F. 2d 391. Answering the Game and Fisheries Departments' argument that Tacoma, as a creature of Washington, "cannot act in opposition to the policy of the State or in derogation of its laws" (see 207 F. 2d at 396), the Ninth Circuit commented (*ibid.*):

> Again, we turn to the First Iowa case [*First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152]. There, too, the applicant for a federal license was a creature of the state and the chief opposition came from the state itself. Yet, the Supreme Court permitted the applicant to act inconsistently with the declared policy of its creator, and to prevail in obtaining a license.[2]

This Court denied certiorari. 347 U. S. 936.

While the Ninth Circuit proceeding was still pending, Tacoma sought in a state court a declaratory judgment as to the validity of a proposed issue of utility revenue bonds to finance the construction of the project, up to the estimated cost of $146,000,000 (R. 1–5).[3] Opposing were the State's Directors of Fisheries and Game, and the court-appointed representatives of the taxpayers of Tacoma (R. 52–56).[3]

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[2] The Ninth Circuit continued (*id.* at 396–97):

> Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States. However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them.

[3] Tacoma's suit was a special declaratory proceeding, provided by state law, to determine the validity of proposed bond issues by municipalities or other local authorities. Rev. Code Wash. (1951) 7.25.010–7.25.040. The statute requires that the suit be entitled as against the taxpayers of the city or area, and

The state Superior Court, Thurston County, sustained a demurrer to the complaint on the grounds that Tacoma, "a subordinate subdivision of the state", must derive its authority to build the dams from the state legislature and that the project was barred by the State's Columbia River Fish Sanctuary Act (Laws, 1949, Ch. 9) which prohibited dams above 25 feet in height upon the part of the Cowlitz involved (R. 57–59).

The Washington Supreme Court reversed in a 6–3 decision (R. 65–96). 43 Wn. 2d 468. It held that under *First Iowa Coop.* v. *Federal Power Commission,* 328 U. S. 152, a federally-licensed project could not be impeded by state restrictions or requirements as embodied in the Fish Sanctuary Act and other laws. Rejecting the contention that Tacoma "being a municipal corporation created by the state, may not defy the laws of its creator" (R. 89), the court pointed out that the city's long-standing power to engage in the electric power business had never been curtailed by the legislature (R. 89–90). Tacoma therefore qualified as a Federal Power Act licensee, the court noted (R. 91):

> The Federal Power Act defines the term municipal corporation and authorizes the power commission to issue a license to such an entity. Appellant has complied with the state law with respect to the right of a municipality to en-

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that the court name certain persons to represent all taxpayers for the purpose of testing the validity of the issue. Section 7.25.020. In the instant case, the state court appointed such representatives (R. 51–52) pursuant to the request in Tacoma's complaint (R. 4).

> ... the business of developing, transmitting and distributing power. Having been granted a license by the power commission, we hold that appellant is at the present time in the same position as any other licensee under the act. * * *

Accordingly, the dismissal of the complaint was reversed and the cause was remanded for further proceedings.

Present Proceedings. In the course of the complicated proceedings following the remand, the Directors of Fisheries and Game moved in the trial court on June 24, 1955, for a temporary restraining order and injunction *pendente lite* to enjoin Tacoma from continuing the development and construction of the project as it had undertaken to do (R. 123–24). Thereafter, the State of Washington, in its sovereign capacity, was added as a party defendant on the Directors' motion (R. 140, 143), and for the first time the defendants raised the issue of Tacoma's power, as a municipality of the State of Washington, to condemn the state-owned Mossyrock fish hatchery operated by the Game Department and located within the Mayfield reservoir site (R. 171, 173, 194, 196).[4] Tacoma's reply denied that it lacked the requisite

[4] The hatchery was included in the area required for the project set forth in Tacoma's municipal ordinance and the Federal Power Commission license (R. 8, 42, 153).

In its amended answer, the State of Washington also alleged that the project would take two other fish hatcheries, about 19 miles of primary state highways and other state-owned lands (R. 193–95). However, the subsequent stipulation established that these other hatcheries would not be affected (R. 229–30). Furthermore, state law provides a method for taking the high-

power to condemn those properties "under the laws of the United States and the State of Washington" (R. 205). It was stipulated that the Mayfield reservoir would flood 61.63 acres of the hatchery, including all its fishponds and buildings (R. 229); Tacoma asserted that the facilities could be relocated to assure continued full operation (R. 207).[5]

The Superior Court ruled that it lacked jurisdiction to pass on Tacoma's eminent domain authority since the lands to be condemned were in another county (R. 258). However, it held that Tacoma was acting illegally in constructing the project since it would interfere with public navigation contrary to state law (R. 258–59). Consequently, the court enjoined Tacoma from spending any more money on the project (260–62). Both sides appealed to the Supreme Court of Washington.

In another 6–3 decision, a new majority of the Washington Supreme Court denied Tacoma's power to condemn the fish hatchery, after ruling that the issue was properly before it (R. 279), and was not foreclosed by *res judicata* or the law of the case (R. 278–81). The court held that Tacoma did not have power to condemn land owned and used by the state for public purposes.

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ways which, aside from the Mossyrock hatchery, were the only other lands involved already dedicated to a public use. Rev. Code Wash. (1951) 90.28.010.

[5] Tacoma had repeatedly offered to buy the hatchery and relocate it with greatly improved facilities at a level above the reservoir, but the State, after finding administratively that the hatchery was "irreplaceable," had rejected the offers. See R. 175, 207, 292–93, 336–37.

In so holding, the Washington court reasoned as follows:—"A municipal corporation does not have an inherent power of eminent domain. It may exercise such power only when it is expressly authorized to do so by the *state legislature*" (italics in original; R. 282). Statutes making such a delegation to a municipality are to be strictly construed (R. 282–83). Several prior decisions under railroad condemnation statutes had held that authority to take lands granted to the state did not include state lands segregated from the public domain and appropriated to a public use (R. 283–84). Accordingly, in the court's view, the state statutes authorizing municipal corporations to operate public utilities and to condemn property in that connection do not authorize Tacoma to condemn state-owned property previously dedicated to a public use (R. 284). The court concluded that "the city of Tacoma has not been endowed with the statutory capacity to condemn such lands" (R. 284) and "*[i]ts inability so to act can be remedied only by state legislation that expands its capacity*" (italics in original; R. 285).

As to the effect to be given to the license issued by the Federal Power Commission, the court was of the view (R. 286):

> * * * the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition*; it presents a question of *lack of state statutory power* in the city. It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the state of Washington.

> The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal power act, as we read it, does not purport to do so. [Italics in original.]

And since the question was not "of the right of the federal government to control all phases of activity on navigable streams, nor a question of its power, under the Federal Power Act, to delegate that right", but of the "capacity of a municipal corporation of this state" to act under the license (R. 285), the court regarded its ruling as not inconsistent with either the earlier Ninth Circuit decision (*supra*, pp. 5–6) or this Court's decision in *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152 (R. 285–86).

On those grounds, the court affirmed the injunction against Tacoma's construction of both dams. (R. 287, 371–73).*

SUMMARY OF ARGUMENT

The state court enjoined Tacoma from proceeding under a federal license for development of the resources of the Cowlitz River, on the ground that the city had no power to condemn a state-owned fish hatchery within the proposed reservoir area. While

* The state court stated that the lower court had erroneously relied upon the Washington laws with respect to public navigation; the federal program could not be impeded by such legislation, similar to the local statutes for protection of fish or requiring permits for diversion of water or building of dams (R. 370–71). However, Tacoma's lack of statutory capacity to condemn state lands dedicated to public use was an alternative, sufficient ground to block the development and to affirm the judgment below (R. 371).

this may be a correct view of Tacoma's power under state law, Tacoma's condemnation of the hatchery constitutes a lawful exercise of the federal power of eminent domain, delegated to Tacoma as a licensee under the Federal Power Act.

I

A. In Section 21 of the Federal Power Act, Congress explicitly authorized licensees to exercise the power of eminent domain in order to take lands for projects licensed by the Federal Power Commission. This is plainly a delegation of the federal power of eminent domain, long recognized as an attribute of the paramount federal sovereignty. That such federal power was intended to be conferred is borne out by the legislative history of the Federal Power Act; by previous cases sustaining condemnations under the Act and under the similar provisions of the Natural Gas Act; and by the scheme of the Power Act, which unqualifiedly asserts federal authority, including eminent domain, and specifically designates other areas left to state control.

B. There is no doubt that Tacoma qualified as a licensee under the Federal Power Act, since it is authorized by state law to engage in the electric utility business, and has done so since 1893, as the Washington Supreme Court recognized. Consequently, for purposes of its license, Tacoma falls within the terms of Section 21, delegating the federal power of eminent domain to licensees under the Power Act.

II

A. An essential element of the paramount federal power of eminent domain is that the United States may delegate it to agents of its own choosing and that no state may prescribe or restrict such delegation. Congress has, in the past, authorized the exercise of the federal condemnation power, and other franchises and powers, by municipalities and state corporations. In these cases, it was recognized that Congress may select state-created entities to carry out a federal program; and that, just as the states may not impede the United States itself, so they cannot interfere with the execution of federal powers by such delegates of the United States.

When a paramount federal power is thus delegated, it makes no difference that the state which created the municipality or corporation did not, or could not, grant it a similar power. Delegation of the federal power of eminent domain has enabled municipalities and state corporations to condemn land outside their state territories, a power which the creating state was constitutionally incapable of giving. Since the federal delegation is a complete, independent source of authority, it is immaterial whether the creating state approves the federal grant. Attempts by the state to oppose the delegation of federal power are ineffective, whether phrased in terms of capacity or otherwise.

This conclusion accords with the general doctrine of federal supremacy. Recognizing the propriety of using state-created entities as instrumentalities of the Federal Government, this Court has struck down

various state restrictions which would have impeded the delegated execution of federal programs.

B. These principles clearly apply, in the instant case, to the delegation of the federal power of eminent domain by Section 21 of the Federal Power Act, taken together with Tacoma's license. The Federal Power Commission issued its license to Tacoma in compliance with the mandate of Congress in the Federal Power Act, which includes a special preferential position for municipalities. The Washington court conceded that the state could not block the federal project by requiring compliance with conflicting state laws on water power and conservation. Similarly, we submit, Tacoma's exercise of the federal power of eminent domain in connection with the license cannot be barred by state law. The decision below would improperly frustrate the Cowlitz project and the Federal Power Commission's choice of licensee.

III

Since Tacoma has validly been delegated the federal power of eminent domain, it may condemn a state-owned fish hatchery in order to execute the development licensed by the Federal Power Commission.

A. It is well settled that the federal condemnation power may be exercised to take, for federal purposes, state-owned property held for a prior public use. This is required by the doctrine of federal supremacy, which is equally effective whether the power is exercised directly by the United States or by a delegate, such as a licensee under the Federal Power Act.

In the instant case, Tacoma's intended federal public use is established by the paramount authority of Congress over commerce and navigable waters, and by Tacoma's federal license, which specifies the hatchery among the "lands constituting the project area" and required for the licensed project. Even if the comparative importance of the old and new public uses were significant, there is no doubt that the Cowlitz power development outweighs by far the state hatchery; it appears, in fact, that the hatchery can be relocated without much difficulty.

B. The decision below is not supported by the alleged rule of Washington law that the condemnation power of municipalities does not extend to state property held for public use. In the first place, this is only a rule of construction of the state grant of eminent domain power; it has no relevance to the federal power exercised by Tacoma as a licensee under the Federal Power Act.

Furthermore, the prior Washington authorities do not suggest that Tacoma lacks capacity to act under a delegation of federal power. Tacoma has a general condemnation power as a municipality under state law and, in construing it, the Washington court has always assumed capacity whenever the grant of power is shown. That licensees under the Federal Power Act receive federal authority has also been recognized. A restrictive view of the state grant of condemnation power to delegates—excluding state lands already being used for public purposes—operates only to permit the state legislature to decide between competing uses both of which are authorized

by it. Such a rule does not operate against the state itself and, similarly, it does not bar the overriding condemnation power of the Federal Government.

ARGUMENT

In the decision under review, the Washington Supreme Court holds that the City of Tacoma, although acting under a valid federal license pursuant to the Federal Power Act, cannot condemn state lands previously dedicated to a public use. The state court recognizes that this ruling operates to prevent the construction of the federally-licensed project (R. 371). If the decision below stands, the anticipated flooding of 61.63 acres of a state fish hatchery, which could probably be adequately relocated (R. 229, 207, 336–37), will block a project costing $146,000,000 which was found by the Federal Power Commission to promise an exceptionally valuable addition to the Northwest Region power supply, and the cheapest, most efficient, and best adapted plan for development of the Cowlitz River (R. 9, 33, 34, 39–40).

The state court reached this result because it believed that only state law could authorize Tacoma to condemn the hatchery, and reviewing the Washington authorities, the court concluded that the power of eminent domain available to Tacoma under state law did not extend to the state hatchery. The federal power of eminent domain was dismissed with these words (R. 286):

> The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator,

and the Federal power act, as we read it, does not purport to do so.

However, we shall show that Section 21 of the Federal Power Act does indeed purport, and was plainly intended by Congress, to delegate the federal eminent domain power to licensees like Tacoma, regardless of state law or state restrictions; and that this federal power may constitutionally be delegated to municipal corporations or other state-created entities, regardless of the power and capacity given them under state law. Furthermore, the federal condemnation power thus delegated is effective to take state lands previously held for public use.

I

BY SECTION 21 OF THE FEDERAL POWER ACT, CONGRESS DELEGATED THE FEDERAL POWER OF EMINENT DOMAIN TO LICENSEES UNDER THE ACT

A. In the Federal Power Act, Congress has explicitly authorized licensees to exercise the power of eminent domain for the construction and operation of the project for which a license has been granted. Section 21 of the Act, *infra*, p. 53, provides:

> That when *any licensee* can not acquire by contract or pledges an unimproved dam site or the right to use or damage *the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto*, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or

> developing a waterway or waterways for the use or benefit of interstate or foreign commerce, *it may acquire the same by the exercise of the right of eminent domain* in the district court of the United States for the district in which such land or other property may be located, or in the State courts. * * * [Emphasis added.]

It can scarcely be doubted that the terms of this portion of Section 21 broadly delegate the federal power of eminent domain to federal licensees, to be exercised independently of state law. The provision is patently a direct authorization, without reference to state law; the sole condition upon the exercise of eminent domain is that the land or site must be "necessary" for the federally-licensed project. And the power thus delegated is necessarily the federal power of eminent domain. This is the only authority which Congress has at its disposal, as an attribute of the federal sovereignty. *Kohl* v. *United States,* 91 U. S. 367, 371–75; *Latinette* v. *City of St. Louis,* 201 Fed. 676, 678 (C. A. 7).

Ever since *Kohl* v. *United States,* 91 U. S. 367, there has been no doubt that the United States has an independent power of eminent domain as an attribute of its sovereignty and that this paramount federal power (91 U. S. at 374):

> * * * must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment.

United States v. *Carmack*, 329 U. S. 230, 236–42; *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641, 656.[7]

The congressional intent to exercise the federal eminent domain power in Section 21 and to provide a comprehensive basis for condemnation by licensees is underlined by the scheme of the Power Act, as analyzed in *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152. Holding that state permission to divert water and build a dam could not be a prerequisite for a federal license, this Court pointed out that the Act represented a major undertaking of the federal government in the development of our water resources (see also *United States* v. *Appalachian Power Co.*, 311 U. S. 377). While certain subjects were left to state control, these were carefully kept separate from areas covered by assertions of federal authority. The

[7] There is, in fact, authority for the proposition that, when solely national purposes are intended, the Constitution permits reliance only upon the federal eminent domain power. See *Kohl* v. *United States*, 91 U. S. at 373–74, citing with approval *Trombley* v. *Humphrey*, 23 Mich. 471, which denied state power to condemn land for a federal lighthouse; see also *Latinette* v. *City of St. Louis*, 201 Fed. at 678.

On the other hand, some courts have said that a federal licensee under the Power Act has the choice of taking land under Section 21 or utilizing a general power of eminent domain which the state had given it. See *Burnett* v. *Central Nebraska Public Power and Irrigation District*, 147 Neb. 458, 470; *Oakland Club* v. *South Carolina Public Service Authority*, 110 F. 2d 84, 86 (C. A. 4). These decisions do not, however, suggest that the state grant could restrict Section 21. They recognize that Section 21 embodies the federal eminent domain power and provides an independent source of authority. Similarly, see *Grand River Dam* v. *Grand Hydro.*, 335 U. S. 359, 373.

plenary nature of such federal powers was described as follows (328 U. S. at 168, 176, 181):

> * * * Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. * * *
>
> * * * [W]here rights are not thus "saved" to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course. * * *
>
> The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls. * * *[*]

The Court then listed elements of this "federal plan of regulation", including (328 U. S. at 181, n. 25):

> * * * § 21, federal powers of condemnation vested in licensee; * * *

That a delegation of an independent federal power was being made in Section 21 was clearly understood by Congress. For that very reason, the provision aroused opposition. When Section 21 was being discussed on the floor of the House, Congressman Eugene Black of Texas interjected (58 Cong. Rec. 1932):

> * * * and the thought occurs to me that unless the State itself will confer on the municipality or subdivision of a State the right of eminent domain it is very doubtful as to whether the Federal Government ought to come in and do it.

Congress overrode such objections when it enacted Section 21. In fact, the provision was broadened to

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[*] See also *Federal Power Commission* v. *Oregon*, 349 U. S. 435, 445-46.

confer the condemnation power generally upon "any licensee" instead of specifying municipalities, political subdivisions of a state, and public utility or service corporations, the form in which it stood when Representative Black took exception (58 Cong. Rec. 2240).

A number of reported cases reflect the utilization of Section 21 by federal power licensees. In all these decisions the courts plainly recognized that it was the delegated condemnation power of the Federal Government which was being exercised. See *Central Nebraska Public Power & Irrigation District* v. *Harrison*, 127 F. 2d 588, 589 (C. A. 8); *Feltz* v. *Central Nebraska Public Power & Irrigation Dist.*, 124 F. 2d 578, 581, 582 (C. A. 8); *Grand River Dam Authority* v. *Thompson*, 118 F. 2d 242, 243 (C. A. 10); *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. 2d 297, 300 (C. A. 8); *Wilson* v. *Union Electric Light & Power Co.*, 59 F. 2d 580, 581 (C. A. 8); *State of Missouri* v. *Union Electric Light & Power Co.*, 42 F. 2d 692, 697–98 (W. D. Mo.); *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606, 610–11, 616–17 (M. D. Ala.). The similar eminent domain provision of the Natural Gas Act, Section 7 (h), 15 U. S. C. 717f (h), has also been applied as a federal authority by natural gas companies. *Thatcher* v. *Tennessee Gas Transmission Co.*, 180 F. 2d 644, 647 (C. A. 5), certiorari denied, 340 U. S. 829; *Williams* v. *Transcontinental Gas Pipe Line Corp.*, 89 F. Supp. 485 (W. D. S. C.).* As we shall show, *infra*, pp. 25, 34, n. 15, these cases

*Section 7 (h) of the Natural Gas Act was adapted from the Power Act's Section 21. H. Rept. No. 695, 80th Cong., 1st Sess., p. 2, 1947 U. S. Code Cong. Serv., p. 1477.

also demonstrate that the federal power can be given to state-created entities. And a situation similar to the instant case was presented in *State of Missouri* v. *Union Electric Light & Power Co., supra,* in which the court held that a licensee under Section 21 could condemn state lands previously dedicated to a public use. See *infra,* pp. 40–41.

B. It should be noted, by way of contrast, that the Power Act does require reference to state law for one pertinent factor—to establish a municipality's basic authority to engage in the utility business. Section 3 (5) of the Act, *infra,* p. 51, defines "licensee" as meaning "any person, State, or municipality licensed under the provisions of section 4 of this Act," and Section 3 (7), *infra,* p. 51, defines "municipality" as "a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power."

There is no doubt that Tacoma fully satisfies this requirement. The Washington Supreme Court, in its earlier opinion (*supra,* pp. 6–8), recognized that Tacoma has lawfully operated electric power facilities since 1893 (R. 89–90) and that it "has complied with the state law with respect to the right of a municipality to engage in the business of developing, transmitting and distributing power. * * *" (R. 91.)[10] The state court thus used the precise terms of Section 3 (7)

[10] In Washington, all classes of municipal corporations have been authorized for at least forty years to operate electric utility systems, including hydroelectric projects (R. 89) ; *Hutton*

of the Federal Power Act, demonstrating that Tacoma had fully qualified to become a federal licensee; the court then stated (R. 91):

> * * * Having been granted a license by the power commission, we hold that appellant [Tacoma] is at the present time in the same position as any other licensee under the act. * * *

See also the decision of the Ninth Circuit in *State of Washington Dept. of Game* v. *Federal Power Commission*, 207 F. 2d 391, certiorari denied, 347 U. S. 936, *supra*, pp. 5–6.

There is, accordingly, no doubt both that the federal eminent domain power has been delegated to "any licensee" under the Federal Power Act and also that Tacoma is such a "licensee." The question then is whether this general delegation of federal power is subject to special restrictions in the case of municipalities or other state-created public entities (discussed in Point II, *infra*, pp. 24–38), and, further, whether this federal power extends to state lands previously held for public use (discussed in Point III, *infra*, pp. 38–50).

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v. *Martin*, 41 Wn. 2d 780, 783; *Tacoma* v. *Nisqually Power Co.*, 57 Wash. 420.

The current statute, Rev. Code Wash. (1951), 80.40.050, *infra*, pp. 57–58, broadly authorizes cities to:

> * * * construct, condemn and purchase, purchase, acquire, add to, maintain, and operate works, plants, and facilities for the purpose of furnishing the city or town and its inhabitants, and any other persons, with gas, electricity, and other means of power and facilities for lighting, heating, fuel, and power purposes, public and private. * * *

See also Rev. Code Wash. (1951), 35.22.280 (15), 35.84.010–35.84.030, 80.40.010, *infra*, p. 53 *ff*.

II

THE FEDERAL EMINENT-DOMAIN POWER UNDER SECTION 21 OF THE FEDERAL POWER ACT MAY BE DELEGATED TO A MUNICIPAL CORPORATION LIKE TACOMA AND TO OTHER STATE-CREATED ENTITIES, REGARDLESS OF ALLEGED LIMITATIONS UPON THEIR POWER AND CAPACITY UNDER STATE LAW

A. When the Washington court stated that "the Federal government may not confer corporate capacity [for eminent domain] upon local units of government beyond the capacity given them by their creator" (R. 286), it held in substance that the exercise of the overriding federal power of eminent domain could be effectively blocked by a state. As we have already noted, *supra*, p. 18, "the manner in which [the federal power] must be exercised" cannot be prescribed by a state (*Kohl* v. *United States*, 91 U. S. 367, 374). We submit that an essential aspect of this power is that the United States may delegate it to agents of its own choosing, including state-created entities."

1. Accordingly, Congress has, upon occasion, chosen to authorize the exercise of the federal eminent domain power by corporations created under federal law (*e. g., Luxton* v. *North River Bridge Co.*, 153 U. S. 525; *Berman* v. *Parker*, 348 U. S. 26); by private corporations created under state law (*e. g., Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641; *Stockton*

" Lands may be condemned for federal purposes either "directly by the sovereign or through an agency appointed by the sovereign." *Lafayette* v. *City of St. Louis*, 201 Fed. 676, 678 (C. A. 7). See Nichols on *Eminent Domain*, Secs. 1.24, 2.13, 2.15; Lewis, *Eminent Domain*, Secs. 367, 374.

v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9 (D. N. J.), appeal dismissed, 140 U. S. 699; cf. *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 100–01); by a state or state bodies (*e. g., City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (S. D. Ill.); *County Court of Wayne County* v. *Louisa & Fort Gay Bridge Co.*, 46 F. Supp. 1, 3 (S. D. W. Va.)); and by municipalities (*e. g., Latinette* v. *City of St. Louis*, 201 Fed. 676 (C. A. 7); *City of Davenport* v. *Three-Fifths of an Acre of Land, supra; Klein* v. *City of Louisville*, 224 Ky. 624). The reported cases under Section 21 of the Power Act show that the federal power there embodied has been exercised by corporations (*State of Missouri* v. *Union Electric Light & Power Co.*, 42 F. 2d 692 (W. D. Mo.); *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606 (M. D. Ala.)); by a state authority (*Grand River Dam Authority* v. *Thompson*, 118 F. 2d 242 (C. A. 10)); and by a state power district (*Central Nebraska Public Power & Irrigation District* v. *Harrison*, 127 F. 2d 588 (C. A. 8)). See p. 21, *supra*.

In the same way, the United States has granted to state companies franchises or powers other than eminent domain, and such grants have been sustained. *Seaboard Air Line Railroad Co.* v. *Daniel*, 333 U. S. 118; *Texas* v. *United States*, 292 U. S. 522; *California* v. *Pacific R. Co.*, 127 U. S. 1, 38, 40–45; *People* v. *Hudson River Connecting Railroad Corp.*, 186 App. Div. 602 (3rd Dept.), affirmed, 228 N. Y. 203, certiorari denied, 254 U. S. 631. In *Seaboard Air Line Railroad*, the Court sustained an Interstate Commerce Commission order which empowered a Virginia cor-

poration to operate in South Carolina, despite a contrary South Carolina law, and stated (333 U. S. at 126–127):

> * * * Although [the last sentence of Section 5 (11) of the Commerce Act [12]] bars creation of a federal corporation, it clearly authorizes a railroad corporation to exercise the powers therein granted over and above those bestowed upon it by the state of its creation. These federally conferred powers can be exercised in the same manner as though they had been granted to a federally created corporation. See *California* v. *Central Pacific R. Co.*, 127 U. S. 1, 38, 40–5. Here, just as a federally created railroad corporation could for federal purposes operate in South Carolina, so can this Virginia corporation exercise its federally granted power to operate in that State.

In the eminent domain field, the propriety of the grant of federal power to state-created entities was first definitively stated by Justice Bradley while on circuit, *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9 (D. N. J.), appeal dismissed, 140 U. S. 699, a classic opinion repeatedly approved by this Court.[13] There,

[12] The last sentence in Section 5 (11) of the Interstate Commerce Act, 49 U. S. C. 5 (11), provides: "Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

[13] See *United States* v. *Carmack*, 329 U. S. 230, 240; *United States* v. *Wayne County, Kentucky*, 252 U. S. 574; affirming 53 Ct. Cls. 417; *Pullman Co.* v. *Kansas*, 216 U. S. 56, 68 (White, J., concurring); *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 532; *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641.

the Attorney General of New Jersey sought to enjoin the construction by the railway, a New York corporation, of a railway bridge authorized by a federal statute from New Jersey to Staten Island, New York. Justice Bradley affirmed "the capacity and right" of the railway to construct the bridge in New Jersey, ruling (32 Fed. at 14–15):

> At all events, if congress, in the execution of its powers, chooses to employ the intervention of a proper corporation, whether of the state, or out of the state, we see no reason why it should not do so. There is nothing in the constitution to prevent it from making contracts with or conferring powers upon, state corporations, for carrying out its own legitimate purposes. What right of the state would be invaded? The corporation thus employed, or empowered, in executing the will of congress, could do nothing which the state could rightfully oppose or object to. It may be added that no state corporation more suitable than the defendant could be empowered to build the bridge in question in this case, since one-half of the bridge is in the state of New York, and the railroad of the defendant is to connect with it on the New York side.[14]

[14] Justice Bradley continued (*id.* at 15):

> In our judgment, if congress itself has the power to construct a bridge across a navigable stream for the furtherance of commerce among the states, it may authorize the same to be done by agents, whether individuals, or a corporation created by itself, or a state corporation already existing and concerned in the enterprise. The objection that congress cannot confer powers on a state corporation is untenable. It has used their agency for carrying on its

While, in *Stockton,* federal power was delegated to a state-chartered private corporation, the principle is equally applicable when the delegation is a municipal corporation created by state law. Thus, in *Latinette* v. *City of St. Louis,* 201 Fed. 676 (C. A. 7), the question related to the power of the City of St. Louis, a Missouri municipal corporation, to condemn land in Illinois for the purpose of building a bridge across the Mississippi River pursuant to a federal statute. Rejecting the argument that the City could not condemn Illinois property because Illinois had not given it the requisite power, the Seventh Circuit pointed out that the construction of the bridge and its necessary approaches were matters of national concern, and ruled (201 Fed. at 678–679):

> own purposes from an early period. It adopted as post-roads the turnpikes belonging to the various turnpike corporations of the country, as far back as such corporations were known, and subjected them to burdens, and accorded to them privileges, arising out of that relation. It continued the same system with regard to canals and railroads when these modes of transportation came into existence. Nearly half a century ago, it constituted every railroad built, or to be built, in the United States, a post-road. This, of course, involved duties, and conferred privileges and powers, not contained in their original charter. In 1866, congress authorized every steam-railroad company in the United States to carry passengers and goods on their way from one state to another, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination. The powers thus conferred were independent of the powers conferred by the charter of any railroad company. Surely these acts of congress cannot be condemned as unconstitutional exertions of power.

> * * * that the nation had the right itself to build and maintain the bridge and approaches, and, for the purpose of acquiring land for the approaches, to exercise the power of eminent domain either directly or through a corporation created by it for that end, without the consent or over the objection of the state—are propositions too well settled to warrant elaboration or debate. * * * Contention is therefore narrowed to this: That Congress could not constitutionally select appellee as the agency through which a national power should be exercised. Nothing in the Constitution forbids the selection of a state corporation as a national agent. *In reason the material thing is the principal's authority, not the parentage or birthplace of the agent.* * * * [Emphasis added.]

Similarly, the courts have upheld the taking by Louisville, Kentucky, and Davenport, Iowa, of lands in neighboring states for use in interstate bridges, under federal grants of authority. *Klein* v. *City of Louisville*, 224 Ky. 624; *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (S. D. Ill.).

2. It has made no difference that the state which created the corporation or municipality did not, or could not, grant it the power which it exercises under its federal authority. Thus, in nearly all the condemnation cases cited, *supra*, pp. 24–29, the federal grant extended the power of the state entities beyond the constitutional capacity of the creating states. "The powers thus conferred were independent of the powers conferred by the charter" received from the creating

states (*Stockton* v. *Baltimore & N. Y. R. Co., supra,* 32 Fed. at 15). The states themselves could not constitutionally have taken property in another state (*County Court of Wayne County* v. *Louisa & Fort Gay Bridge Co., supra*), nor have authorized a private corporation created by them (*Stockton & Baltimore* v. *N. Y. R. Co., supra*) or their municipal corporations (*Latinette* v. *City of St. Louis, supra; City of Davenport* v. *Three-Fifths of an Acre of Land, supra; Klein* v. *City of Louisville, supra*) to condemn property in another state. Furthermore, no state could empower its corporation to exercise eminent domain in Indian territory (*Cherokee Nation* v. *Kansas Railway Co., supra*). Nevertheless, in each of these situations, the grant of federal authority to a state-created instrumentality, for the purpose of enabling it to carry out federally-authorized functions, was effective to bestow the requisite power.

Consequently, since the federal delegation provides a complete independent source of condemnation power for municipalities or corporations, it is immaterial to consider the views or the law of the state which created them. In *Klein* v. *City of Louisville, supra,* the Kentucky court pointed out the immateriality of a state law which purported to authorize Louisville "to exercise in any adjoining state such powers of eminent domain as may be conferred * * * by * * * Congress." 224 Ky. at 627. The court noted that, under state law, these would be invalid "extraterritorial powers," *id.* at 633. Nevertheless, the federal powers could be exercised by the city as a federal agent (*id.* at 633–35), and, in that event, "it is not essential for the state

Legislature to authorize its officers to so act" (*id.* at 635). Similarly, in *California* v. *Pacific R. Co.*, 127 U. S. 1, Congress empowered the Southern Pacific Railroad to extend its line to the Colorado river, not covered by its original California charter. Thereafter, the state legislature also authorized this extension. This Court noted that the "duplication" of the federal grant "was probably procured to remove all doubts with regard to the company's power to construct such roads. It is apparent, however, that the franchise to do so was fully conferred by Congress * * *." 127 U. S. at 44–45.

If it is an act of supererogation for a state to approve the federal grant of eminent domain to a state-created entity, it follows that the state's objections, whether phrased in terms of capacity or otherwise, cannot impede the exercise of the federal power. Thus, in upholding the freedom from state control of railroads under orders of the Interstate Commerce Commission, this Court has not suggested any difference between exemptions granted from the laws of another state (e. g., *Seaboard Air Line Railroad Co.* v. *Daniel*, 333 U. S. 118, *supra*, pp. 25–26), or from the laws of the state which chartered the railroad (*Texas* v. *United States*, 292 U. S. 522).

A striking illustration is provided by *People* v. *Hudson River Connecting Railroad Corp.*, 186 App. Div. 602 (3rd Dept.), affirmed, 228 N. Y. 203, certiorari denied, 254 U. S. 631 (*supra*, p. 25). The corporation was created under the terms of the New York Railroad Law for the purpose of building a railroad, including a bridge across the Hudson. Construction

of the bridge was authorized by a special state statute, which placed certain restrictions upon its size, clearance, and other factors. Congress then authorized construction of the same bridge without these restrictions. Thereupon, the New York legislature amended the section of the state's Railroad Law which set forth the powers of corporations created under it, and inserted conditions upon the charter powers which would have prevented the execution of the federal authorization. 186 App. Div. at 605, 612. Laws 1918, c. 166, amending New York Railroad Law (McKinney's Consol. Laws, Title 48) Section 8 (3). The railroad was thus faced with an express limitation in its statutory powers clause, not merely, as here, a questionable judicial construction of prior precedents. See pp. 44–50, *infra*. Nevertheless, the New York court upheld the railroad's federal franchise, and flatly rejected the state's attempt to limit the railroad's "capacity" to act under it, in these cogent words (186 App. Div. 611–12):

> It is suggested that the State having created the defendant may limit its operation in respect to the bridge in question; that the creator may control its creature. * * * Ordinarily it may be true that the Legislature may within proper limits control a corporation created by itself. But the question here is whether it can do so when the sole effect of the attempted control is to thwart the will of Congress in respect to a matter exclusively within its jurisdiction. The State cannot prevent the construction of this bridge. Can it, therefore, hinder, impede and embarrass its construction

> by arbitrarily or capriciously declaring it unlawful for its corporation to engage in such construction? It seems to me the only logical answer is in the negative. * * *

In short, regardless of the mechanism devised, a state cannot obstruct the lawful delegation of the federal power of eminent domain to a state-created entity. For, as stated in *Latinette* v. *City of St. Louis*, *supra*, 201 Fed. at 679, "In reason the material thing is the principal's authority [*i. e.*, the federal government], not the parentage or birthplace of the agent."

3. This conclusion follows from, and accords with, the general doctrine of federal supremacy. When municipalities and state corporations act as valid instrumentalities of the Federal Government, federal supremacy precludes state attempts to interfere with the authorized projects or to circumscribe the execution of delegated federal powers. From the earliest days, state-created entities have been utilized as instrumentalities of the Federal Government. See footnote 14, *supra*, p. 27. Both this Term and last Term, the Court reaffirmed this practice when it struck down an attempt by a state to impose its normal licensing requirements upon a contractor chosen by the United States (*Leslie Miller, Inc.* v. *United States*, 352 U. S. 187), or its normal rate procedures upon a carrier utilized by the United States (*Public Utilities Commission* v. *United States*, No. 23, October Term 1957, decided March 3, 1958). The Court pointed out that federal procurement statutes and regulations committed certain decisions to federal officials, *e. g.*, in *Leslie Miller, Inc.*, selection of "the lowest responsible

bidder". Such determination by federal officials could not be subjected to the "virtual power of review" of a state body. 352 U. S. at 189–90. See also, *e. g., Johnson* v. *Maryland,* 254 U. S. 51, 56–57; *Cities Service Gas Co.* v. *State Corporation Commission of Kansas,* 355 U. S. 391.

B. There is every reason to apply these settled principles to Section 21 of the Federal Power Act, and its broad grant of eminent domain power to "any licensee" under the Act.[15] Congress has given a mandate to the Federal Power Commission which should not be countermanded by state legislatures, state executives, or state courts. In the instant case, the decision of the court below reviewed and—as a practical matter—upset the selection of a federal licensee made in compliance with an explicit direction of Congress. Under Section 7 (a) of the Power Act, 16 U. S. C. 800 (a), *infra,* pp. 51–52, the Commission must compare alternative plans according to how they are "adapted to conserve and utilize in the public interest the water resources of the region." Furthermore, the Commission is specifically directed in Section 7 (a) to give preference to states and municipalities over other applicants when their plans equally meet the statutory criterion.

[15] Until the decision below, condemnations under Section 21 have been enforced without mention of state law or of the licensee's capacity under it (*supra,* pp. 21, 25). The courts have apparently assumed, to quote the District Court in Missouri, that "it cannot be questioned but that the Congress had the power to confer the right of eminent domain upon" the licensees. *State of Missouri* v. *Union Electric Light & Power Co.,* 42 F. 2d at 698.

Following this mandate, the Commission found that Tacoma's project on the Cowlitz could be constructed more quickly and economically than any alternative (R. 34) and that it (R. 39–40)—

> * * * is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes.

See pp. 4–5, *supra*. The Commission's adherence to the statutory preference for public bodies is demonstrated by the fact that of the 245 major projects licensed up to June 1957, with aggregate ultimate generating capacity of 23,161,136 horsepower, municipalities and state bodies have been licensed for 43, to produce 7,530,000 horsepower.[16]

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[16] Federal Power Commission, Thirty-Seventh Annual Report, Fiscal Year ended June 30, 1957, pp. 56, 91–96. With respect to completed projects under Power Act licenses at June 1957, municipalities and state bodies were operating 32 projects with a capacity of about two million horsepower out of a total installed capacity under license of 11,259,799 horsepower.

The preferential position of States and municipalities was extensively discussed before passage of the Power Act. *E. g.*, 56 Cong. Rec. 9113, 9313–16, 9804; 58 Cong. Rec. 2037–40; 59 Cong., Rec. 1172–73. It is also reflected in the Act's exemption of states and municipalities from annual license charges insofar as they utilize power for public purposes or sell to the public without profit, Section 10 (e), 16 U. S. C. 803 (e), *infra*, p. 52, and in their more recent exemption from recapture by the United States and from certain bookkeeping requirements (67 Stat. 587, 16 U. S. C. (1952 ed., Supp. IV) 828–828c). Similarly, municipalities are among those preferred

Nevertheless, the Washington court frustrated the choice of Tacoma as a federal licensee, by ruling that the city could only condemn property by virtue of authority from the state legislature. While conceding that the Washington legislature cannot prohibit the federal project or demand compliance with state requirements for permits, technical supervision or conservation, the state court asserts that a different problem is presented by Tacoma's "lack of state statutory power" to condemn the fish hatchery (R. 286).[17]

But the point is, as we have stressed, that the delegation of federal eminent domain power is an act of

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in sales of power by the Tennessee Valley Authority, the Bonneville Project and the Fort Peck Project. Sec. 10 of Tennessee Valley Authority Act, 48 Stat. 64, 16 U. S. C. 831i; Secs. 3, 4 of Bonneville Act, 50 Stat. 733, 16 U. S. C. 832b, 832c; Secs. 3, 4 of Fort Peck Act, 52 Stat. 405, 16 U. S. C. 833b, 833c.

[17] The state court employed a distinction between Tacoma's "lack of power" to condemn, which allegedly bars the federal project, and the other state "prohibitions", which would be ineffective to do so, in order to avoid the impact of *First Iowa Coop. v. Federal Power Commission*, 328 U. S. 152, *State of Washington Dept. of Game v. Federal Power Commission*, 207 F. 2d 391, certiorari denied, 347 U. S. 936 and its own previous opinion, 43 Wn. 2d 468 (R. 65–92). See pp. 9–11, *supra*.

However, there is nothing in Washington law to support the theory that a unique capacity is required for the eminent domain power, as compared with, *e. g.*, the power to build power plants. See pp. 45–49, *infra*. Furthermore, the Washington court and the Ninth Circuit, when dealing with such powers other than eminent domain, both held that Tacoma could "defy the laws of its creator" and ignore restrictions of state law (R. 89–91; 207 F. 2d at 396), even though at least one of the state laws, the Fish Sanctuary Act, was apparently passed for the express purpose of blocking the Cowlitz project (R. 95). And as the Ninth Circuit pointed out, the petitioner in *First Iowa Coop.* was a cooperative organized in Iowa which also did not have to comply with the laws of the state which

an independent and superior sovereign, and is an essential part of the federal license to build the dams. Just as Washington may not assert a "veto power over the federal project", because of Congress' plenary authority to regulate commerce (*First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. at 164; *supra*, pp. 19–20), so it may not challenge Tacoma's exercise of the federal power of eminent domain. Section 21's express delegation "leave[s] no room or need for conflicting state controls"; state law limitations upon Tacoma are superseded as a matter of "natural course". See *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. at 181, 176.[28] If the decision below stands, an easy avenue will be open for any state to "veto" the Commission's grant of a license to a municipality, despite the preferential treatment which Section 7 (a) of the Power Act commands (*supra*, p. 34). And the Federal Power Com-

created it (207 F. 2d at 396). See 328 U. S. at 156. See pp. 5–6, *supra*.

It should be noted that the decision below would lead to the anomalous result that Washington could prevent Tacoma from executing the Cowlitz development, and might possibly apply the same bar of lack of power to a private Washington corporation, but it could not "prohibit" a municipality or company of another state from carrying out the same project.

[28] On the other hand, neither the Power Act nor the license purport to deal with Tacoma's abilities or techniques in financing the project. Hence, its authority under state law may be consulted, as the Ninth Circuit stated (207 F. 2d at 396):

> * * * However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. * * *

mission, confronted with the potential inability of municipal corporations otherwise authorized under state law to proceed under a federal license, might have little choice but to grant the license to private power companies which presumably would not be subject to the special rule espoused below for municipalities.

III

THE STATE-OWNED MOSSYROCK FISH HATCHERY MAY BE TAKEN BY TACOMA, AS LICENSEE UNDER THE FEDERAL POWER ACT, IN THE EXERCISE OF ITS FEDERAL POWER OF EMINENT DOMAIN

We have shown that the Federal Government may validly vest power in a state-created entity—beyond that given it by the state—in order to enable it to carry out federally-authorized functions (*supra*, pp. 17–22, 24 *ff*) and that Tacoma as a licensee has been fully given the federal condemnation power by Section 21 of the Power Act (*supra*, pp. 22–23, 34–38). It is also clear that Tacoma may, in order to build and maintain the Mossyrock and Mayfield dams, condemn the 61.63 acres of the state-owned fish hatchery.

A. THE FEDERAL CONDEMNATION POWER DELEGATED TO TACOMA EXTENDS TO STATE LANDS HELD FOR A PRIOR PUBLIC USE

1. It is now settled that the federal power of eminent domain may be exercised to take state-owned property held for a prior public use. *United States* v. *Carmack*, 329 U. S. 230; *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U. S. 508; *Wayne County, Kentucky* v. *United States*, 53 Ct. Cls. 417, affirmed, 252 U. S. 574. Cf. *United States* v. *Gettysburg Electric Ry. Co.*, 160

U. S. 668; *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 100-01; *Kohl* v. *United States*, 91 U. S. 367, 371; 12 Op. A. G. 173, 175. A wide variety of such state property has been thus condemned when required in execution of a federal program.[19]

The Court restated the supremacy of this federal power in *United States* v. *Carmack*, *supra*, where the federal government condemned, for a post office and customs house, state property including a county court house, city hall and public park (329 U. S. at 236, 239, 240):

> The power of eminent domain is essential to a sovereign government. If the United States has determined its need for certain land for a

[19] *Oklahoma* v. *Guy F. Atkinson*, *supra* (state schools, highways, rights-of-way, bridges, prison farm); *Wayne County, Kentucky* v. *United States*, *supra* (state highway); *United States* v. *Montana*, 134 F. 2d 194 (C. A. 9), certiorari denied, 319 U. S. 732 (school lands); *Minnesota* v. *United States*, 125 F. 2d 636 (C. A. 8), affirming, 27 F. Supp. 167 (D. Minn.) (public hunting and game refuge); *United States* v. *Wheeler Township*, 66 F. 2d 977 (C. A. 8) (highways); *United States* v. *Latham Bixby Co.*, 55 F. 2d 317 (S. D. Cal.), affirmed *sub nom. C. M. Patten & Co.* v. *United States*, 61 F. 2d 970 (C. A. 9), vacated as moot, 289 U. S. 705 (public park); *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (S. D. Ill.); *United States* v. *.8677 Acre of Land*, 42 F. Supp. 91 (E. D. S. C.) (street and highway); *United States* v. *273.98 Acres of Land*, 41 F. Supp. 683 (W. D. Wash.) (school lands); *United States* v. *72 Acres of Land*, 37 F. Supp. 297 (N. D. Cal.), affirmed, 124 F. 2d 959 (C. A. 9) (waterfront); *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372 (D. Md.) (public square, park); *United States* v. *Sixty Acres of Land*, 28 F. Supp. 368 (E. D. Ill.) (public cemeteries); *United States* v. *Forty Acres of Land*, 24 F. Supp. 329 (D. Idaho) (school lands); *United States* v. *City of Tiffin*, 190 Fed. 279 (N. D. Ohio) (public alley).

> public use that is within its federal sovereign powers, it must have the right to appropriate that land. Otherwise, the owner of the land, by refusing to sell it or by consenting to do so only at an unreasonably high price, is enabled to subordinate the constitutional powers of Congress to his personal will. * * *
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> * * * The principle of federal supremacy, so well expressed in the *Kohl* case [see *supra*, p. 18], argues against * * * subordination of the decisions of federal representatives to those of individual grantors or local officials as to the means of carrying out an admittedly federal governmental function. * * *
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> The considerations that made it appropriate for the Constitution to declare that the Constitution of the United States, and the laws of the United States made in pursuance thereof, shall be the supreme law of the land [citing U. S. Const., Art. VI.] make it appropriate to recognize that the power of eminent domain, when exercised by Congress within its constitutional powers, is equally supreme. * * *

There is, thus, no doubt that the state-owned Mossyrock fish hatchery is subject to the federal eminent domain power; Section 21 of the Power Act (*supra*, pp. 17–18) is broad enough in terms to cover state as well as private property taken by a licensee. And whether exercised by the United States directly or through a licensee or agent, the federal supremacy stressed in *Carmack* is equally effective. Very close to the present situation is *State of Missouri v. Union Electric Light & Power Co.*, 42 F. 2d 692 (W. D. Mo.), where the state sought to enjoin a licensee under the

Federal Power Act from constructing the authorized project because it would inundate many public highways, school districts, and a courthouse and jail. The court held, first, that Congress had delegated the federal power to the company through Section 21 of the Act (see p. 34, n. 15 *supra*). Considering whether the federal eminent domain embraced property already dedicated to a public use, the court commented (42 F. 2d at 698):

> * * * the proposed improvements could not be accomplished, except through the exercise, if necessary, of eminent domain against property already dedicated to public use. To deny the right of eminent domain as against this public property would not only defeat the functions of the national government, but would run contrary to the obvious intent of the Congress as expressed in the Water Power Act. * * *

2. Of course, state-owned land cannot be taken by federal eminent domain unless it is for a federal public use. In *United States v. Carmack*, 329 U. S. 230 (*supra*, pp. 39–40), the state site was condemned by the Federal Works Administrator and the Postmaster General under their general authority to select and condemn land for post offices and customs houses. The Court satisfied itself that a federal use was involved (329 U. S. at 239):

> * * * While the federal power of eminent domain is limited to taking property for federal public use, the question of the existence of a federal public use presents no difficulty here

> because the constitutional power of Congress to establish post offices is express. * * * [20]

In the instant case, as well, the Federal Power Act's licensing procedures assure that "the question of the existence of a federal public use presents no difficulty." The exclusive authority of the Federal Power Commission over the development of the Cowlitz River is undeniable. *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152; *United States* v. *Appalachian Power Co.*, 311 U. S. 377. Furthermore, as we have shown, *supra*, pp. 22, 34–35, the Commission's award of the license to Tacoma was directly pursuant to the Act.

The license granted to Tacoma designated "[a]ll lands constituting the project area and enclosed by the project boundary" (R. 42), including the area

[20] The Court amplified this point, as follows (329 U. S. at 242):

> The foregoing establishes the principle of the supremacy of a federal public use over all other uses in a clearly designated field such as that of establishing post offices. The Government here contends that the officials designated by Congress have been authorized by Congress to use their best judgment in selecting post office sites. It contends also that if the officials so designated have used such judgment, in good faith, in selecting the proposed park site in spite of its conflicting local public uses, the Federal Works Administrator has express authority to direct the condemnation of that site. We agree with those contentions. * * *

It appears, therefore, that when an undoubted federal function is exercised to take lands for public use, the federal supremacy is effective against any prior state use. See pp. 39–40, *supra*. In the instant case, in any event, there is no doubt that the proposed federal use is superior in value and importance. See p. 44, *infra*.

to be inundated. It is therefore, clearly established that these lands, to use the language of Section 21 of the Power Act, are—

> * * * necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce * * *

Cf. *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U. S. at 510-11. Such necessity to carry out a specific federal project, in turn, establishes the federal purpose. Since the licensed development "could not be accomplished except through the exercise * * * of eminent domain against property already dedicated to public use", the taking of such property is necessarily implied in Congress' delegation of the federal power in Section 21. *State of Missouri* v. *Union Electric Light & Power Co.*, 42 F. 2d 692, 698 (W. D. Mo.); *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794, 799-800 (S. D. Ill.); *United States* v. *Sixty Acres of Land*, 28 F. Supp. 368, 373 (E. D. Ill.). Cf. *United States* v. *South Dakota*, 212 F. 2d 14, 16 (C. A. 8).[21]

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[21] In *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, this Court observed that the federal government is likely to exercise the power of eminent domain more carefully than a private corporation to whom the power is delegated and that, consequently, in the latter case, "the presumption that the in-

3. Should the comparative importance of the old and new public uses be significant (see *United States v. Carmack*, 151 F. 2d 881 (C. A. 8), reversed, 329 U. S. 230; *supra*, pp. 39–40; n. 20, p. 42) the circumstances of this case establish the propriety of exercising the federal eminent domain power against the state property here. If Tacoma cannot take 61.63 acres of the fish hatchery, it will be unable to construct the extensive project licensed by the Commission which would go a long way toward alleviating the power shortage in the Pacific Northwest, and provide other benefits, carrying out comprehensive development of our water resources. See *supra*, pp. 4–5. On the other hand, if Tacoma can condemn the lands on which the fish hatchery is now located, the hatchery can, at a relatively small cost, be relocated within a short distance of the present site (see *supra*, pp. 9, 16). If a comparison of the relative importance of the two public uses is appropriate, the balance would clearly swing in favor of condemnation for the federal project.

B. THE ALLEGED RULE OF WASHINGTON LAW LIMITING CONDEMNATION OF PROPERTY DEDICATED TO PUBLIC USE DOES NOT SUPPORT THE DECISION BELOW

The state court relies upon an asserted rule of Washington law that the power or capacity of immune

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tended use for which the corporation proposes to take the land is public, is not so strong * * *" (329 U. S. at 680.) The Court did not thereby question the supremacy of the delegated federal power over a prior state use, but merely suggested that such delegated exercise of the power to a private party would be examined more closely, to be positive that the taking is indeed connected with a federally authorized public use, and not for a private purpose. See also *United States v. Parker*, 315 U. S. 275, 279 ff.

palities to take by eminent domain does not extend to state property dedicated to a public use, unless expressly so provided by the state legislature (R. 282–84). But this alleged rule does not support the court's holding in this case.

1. In the first place, such an asserted limitation is "really only a rule of construction of the terms of the grant" of state condemnation power (*United States* v. *Certain Parcels of Land*, 30 F. Supp. 372, 378 (D. Md.); see *infra*, pp. 48–49). Since, under its federal license, Tacoma is exercising the independent federal power, the state rule is irrelevant. See Points I, II, and III, A, *supra*, p. 17, *et seq.*

2. Furthermore, there appears to be no substantial basis in previous Washington authorities for the theory of the court below that the state rule purports to restrict the inherent capacity of municipalities, and that, therefore, state law forbids Tacoma from acting under a delegation of federal power. Tacoma undoubtedly has the general statutory capacity under state law to condemn needed land in connection with its electric utility business, including its operation of hydroelectric projects. Rev. Code Wash. (1954), 80.40.050, 8.12.030, 35.22.280 (6), 35.84.010–35.84.030, 80.40.010, Appendix, *infra*, pp. 53–58. See also pp. 22–23, *supra*. The grant of such condemnation power for electric power purposes, although in general terms, has been held to extend to state-owned lands and to power facilities already operated by public service corporations. *Tacoma* v. *State*, 121 Wash. 448; *Tacoma* v. *Nisqually Power Co.*, 57 Wash. 420.

Far from distinguishing between "capacity" and "power," the prior Washington decisions, including those cited by the court below, assume the existence of capacity once power or authority has been granted. Thus not only do the court's quotations from Lewis on *Eminent Domain* and 91 L. Ed. 259 (see R. 282–83) both deal with the power of state agencies under a delegation from the state, not their capacity, but *State* v. *Superior Court*, 91 Wash. 454, and *Seattle & Montana Ry. Co.* v. *State*, 7 Wash. 150 (R. 283–84), similarly are phrased in terms of power, and not capacity.[22] Both these cases concerned the authority of railroads to condemn (under state statutes) property already dedicated to public use, and they merely held that the statutes did not confer power to condemn such property. These rulings plainly are not denials of capacity, once authority is shown to have been granted by the state or federal government.

Particularly pertinent is *Tacoma* v. *State*, 121 Wash. 448, *supra*, cited by the court below in its opinion on the prior appeal (R. 90). In that case, Tacoma sought to condemn certain lands and interests in connection with its construction of another hydroelectric plant. Among this property were (1) a so-called "eyeing station" which the state owned and claimed that it intended to use as a fish hatchery, (2) some of the waters passing a state-owned fish hatchery then in use, (3) a portion of the lands within a school section

[22] In *State* v. *Superior Court*, *supra*, the Washington court stated (91 Wash. at 461): "In the case before us, the question is solely one of power. The question is whether the state has granted to railway companies the right to condemn land which it has reserved and set apart for a public use."

owned by the state, and (4) waters presently used by fish for propagation. In upholding the condemnation by the city, the Washington court expressed no concern over Tacoma's capacity to condemn but considered the substantiality of the alleged prior public use and the relative public benefits from the competing uses. See 121 Wash. at 452-454.

Thus, as to the "eyeing station," the court commented (121 Wash. at 452):

> The mere fact that the state owns the property and has the right and power to devote it to a public use is not sufficient to prevent the city from diverting the water therefrom, under the broad powers conferred upon cities by our statute, Rem. Compiled Statutes, § 9488, or, in any event, the unfulfilled purpose of the state, indefinite as to time and conditions, must, under § 4, ch. 117, p. 488, Laws of 1917 (Rem. Comp. Stat., § 7354), give way to the immediate and definite use proposed by the city.

Similarly, as to the diversion of water past the fish hatchery, the court noted (121 Wash. at 453):

> * * * It may be, as contended by the state, that from the fact that condemnation is sought will flow the presumption of damage to the owner, but if so it may be only because water is taken which is not used or necessary to be used in carrying out the public purpose to which the property is devoted. However that may be, the evidence disclosed by the record is sufficient to overcome any presumptions, and preponderates to the effect that, after the proposed diversion, there will be ample water in the main stream for the use of the hatchery, and that the diversion will even be a benefit to the hatchery, in that it will reduce the flow in times of high water, which now causes damage. * * *

And, in the same vein, the court held as to the waters used for fish propagation (*id.* at 453-454):

> The contention that the diversion of the waters will destroy or seriously damage the propagation of food fish, we cannot find to be sustained by a preponderance of the evidence. But even if it were, we would be reluctant to

Accordingly, when Tacoma receives a delegation of condemnation power from the federal government, as in the instant case, the previous Washington authorities do not suggest any inherent incapacity to execute that delegation. The state court has, moreover, previously indicated its understanding of the obvious fact that licensees under the Power Act do receive powers from the United States. See R. 65–92; *State ex rel. Washington Water Power Co.* v. *Superior Court*, 34 Wn. 2d 196, 203–04, appeal dismissed, 339 U. S. 907; *Great Northern R. Co.* v. *Washington Electric Co.*, 197 Wash. 627, 641.[24]

Indeed, the policy behind the rule of Washington law regarding prior public use—relied on by the opinion below—demonstrates that it does not rest on any "lack of capacity" which would interfere with federal functions. As a number of federal decisions have observed, strict construction of state grants of eminent domain aims at retaining in the state legislature the ultimate right to decide between competing uses authorized by it, unless already expressly provided. *United States* v. *Jotham Bixby Co.*, 55 F. 2d 317, 318–20, affirmed, *sub nom. C. M. Patten & Co.* v. *United States*, 61 F. 2d 970 (C. A. 9), vacated as

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hold that the fish, by following their natural instincts, had devoted the stream to such a public purpose as would defeat the city's rights under the statutes hereinbefore cited

[24] Moreover, the commentators cited by the court below in support of state limitations upon municipalities also recognize, of course, the existence of an independent federal power of eminent domain. See 11 McQuillin, *Municipal Corporations*, Sec. 32.09; Lewis, *Eminent Domain*, Sec. 367; Annotation, 91 L. Ed. 221, 222–36. See also Nichols on *Eminent Domain*, Secs. 1.24, 2.113, 2.21, 2.13, 2.131, 2.15.

moot, 289 U. S. 705; *United States* v. *City of Tiffin*, 190 Fed. 279, 281 (N. D. Ohio); *United States* v. *.8677 Acre of Land*, 42 F. Supp. 91, 96 (E. D. S. C.); *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372, 378–79 (D. Md.); *United States* v. *Sixty Acres of Land*, 28 F. Supp. 368, 372–73 (S. D. Ill.). Since it merely reserves the legislative power to the legislature, the rule applies only against *delegates of state power*. It has no effect against the sovereign itself; a prior public use authorized by the state cannot prevent subsequent state legislative condemnation (see R. 282–83). A *fortiori*, a use authorized by the state cannot block the exercise of the superior sovereign power of the Federal Government either directly or through its agents.[25]

Finally, even if Washington law were clearly that Tacoma has capacity to take delegations of eminent domain power from the state, but not from the United States, no such discrimination against the federal government could stand. Cf. *Testa* v. *Katt*, 330 U. S. 386, 394. Regardless of state law, as we have shown in Point II, and Point III, A, *supra*, the United

[25] Therefore, even if congressional delegations of the eminent domain power are similarly to be strictly construed as against prior public uses (see *United States* v. *Carmack*, 329 U. S. at 243, n. 13), the discussion in the text shows that this should protect only competing public uses authorized by the same sovereign—*i. e.*, by the Federal Government—which would present "others exercising equal or greater public powers" (*ibid.*). It would present no problem in this case, since the license awarded Tacoma shows that the power to condemn the hatchery was "necessarily implied" (*ibid.*). As regards a competing use authorized by a state, the only question is whether the intended use by the federal delegate is indeed an authorized public use. See *supra*, n. 21, p. 43; n. 20, p. 42.

States may choose a state entity to execute a federal program and grant it sufficient power. Here, therefore, Tacoma could condemn the state fish hatchery in order to carry out its license under the Federal Power Act.

CONCLUSION

We respectfully submit that the decision below should be reversed.

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APPENDIX

1. The Federal Power Act, 41 Stat. 1063, *et seq.*, as amended, 16 U. S. C. 791, *et seq.*, provides in pertinent part:

SECTION 3, 16 U. S. C. 796:

The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * *

(5) "licensee" means any person, State, or municipality licensed under the provisions of section 4 of this Act, and any assignee or successor in interest thereof;

* * * * *

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

* * * * *

SECTION 7, 16 U. S. C. 800:

(a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give

preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

* * * * *

SECTION 9, 16 U. S. C. 802:

That each applicant for a license hereunder shall submit to the commission—

* * * * *

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

* * * * *

SECTION 10, 16 U. S. C. 803:

All licenses issued under this Part shall be on the following conditions:

* * * * *

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission * * * *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; * * *

* * * * *

SECTION 21, 16 U. S. C. 814:

That when any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

2. The Revised Code of Washington (1951) provides in pertinent part:

SECTION 8.12.030:

CONDEMNATION AUTHORIZED—PURPOSES ENUMERATED. Every city and town and each unclassified city and town within the state of Washington, is hereby authorized and empowered to condemn land and property, including state, county and school lands and property for streets, avenues, alleys, highways; bridges, approaches, culverts, drains, ditches, public squares, public markets, city and town halls, jails and other public buildings, and

for the opening and widening, widening and extending, altering and straightening of any street, avenue, alley or highway, and to damage any land or other property for any such purpose or for the purpose of making changes in the grade of any street, avenue, alley or highway, or for the construction of slopes or retaining walls for cuts and fills upon real property abutting on any street, avenue, alley or highway now ordered to be, or such as shall hereafter be ordered to be opened, extended, altered, straightened or graded, or for the purpose of draining swamps, marshes, tidelands, tide flats or ponds, or filling the same, within the limits of such city, and to condemn land or property, or to damage the same, either within or without the limits of such city for public parks, drives and boulevards, hospitals, pesthouses, drains and sewers, garbage crematories and destructors and dumping grounds for the destruction, deposit or burial of dead animals, manure, dung, rubbish, and other offal, and for aqueducts, reservoirs, pumping stations and other structures for conveying into and through such city a supply of fresh water, and for the purpose of protecting such supply of fresh water from pollution, and to condemn land and other property and damage the same for such and for any other public use, after just compensation having been first made or paid into court for the owner in the manner prescribed by this chapter.

SECTION 35.22.280:

SPECIFIC POWERS ENUMERATED. Any city of the first class shall have power

* * * * * *

(6) To purchase or appropriate private property within or without its corporate limits, for its corporate uses, upon making just compensation to the owners thereof, and to institute and maintain such proceedings as may be authorized by the general laws of the state for the

appropriation of private property for public use;

* * * * *

(15) To provide for lighting the streets and all public places, and for furnishing the inhabitants thereof with gas or other lights, and to erect, or otherwise acquire, and to maintain the same, or to authorize the erection and maintenance of such works as may be necessary and convenient therefor, and to regulate and control the use thereof;

* * * * * *

SECTION 35.84.010:

ELECTRIC ENERGY—SALE OF—PURCHASE. Every city or town owning its own electric power and light plant, shall have the right to sell and dispose of electric energy to any other city or town, public utility district, governmental agency, or municipal corporation, mutual association, or to any person, firm, or corporation, inside or outside its corporate limits, and to purchase electric energy therefrom.

SECTION 35.84.020:

ELECTRIC ENERGY FACILITIES—RIGHT TO ACQUIRE. Every city or town owning its own electric power and light plant may acquire, construct, purchase, condemn and purchase, own, operate, control, add to and maintain lands, easements, rights-of-way, franchises, distribution systems, substations, inter-tie or transmission lines, to enable it to use, purchase, sell, and dispose of electric energy inside or outside its corporate limits, or to connect its electric plant with any other electric plant or system, or to connect parts of its own electric system.

SECTION 35.84.030:

LIMITATION ON RIGHT OF EMINENT DOMAIN. Every city or town owning its own electric

power and light plant may exercise the power of eminent domain as provided by law for the condemnation of private property for any of the corporate uses or purposes of the city or town: *Provided*, That no city or town shall acquire, by purchase or condemnation, any publicly or privately owned electric power and light plant or electric system located in any other city or town except with the approval of a majority of the qualified electors of the city or town in which the property to be acquired is situated; nor shall any city or town acquire by condemnation the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated by any municipal corporation, mutual, nonprofit, or cooperative association or organization, or by a public utility district.

SECTION 80.40.010:

AUTHORITY TO ACQUIRE AND OPERATE WATERWORKS. A city or town may construct, condemn and purchase, purchase, acquire, add to, maintain, and operate waterworks, within or without its limits, for the purpose of furnishing the city and its inhabitants, and any other persons, with an ample supply of water for all purposes, public and private, including water power and other power derived therefrom, with full power to regulate and control the use, distribution, and price thereof: *Provided*, That all water sold by a municipal corporation outside its corporate limits shall be sold at just and reasonable rates.

For such purposes any city or town may take, condemn and purchase, purchase, acquire, and retain water from any public or navigable lake or watercourse, surface or ground, and, by means of aqueducts or pipe lines, conduct it to the city or town; and it may erect and build dams or other works across or at the outlet of any lake or watercourse in this state for the

purpose of storing and retaining water therein up to and above high water mark; and for all the purposes of erecting such aqueducts, pipe lines, dams, or water works or other necessary structures in storing and retaining water, or for any of the purposes provided for by this chapter, the city or town may occupy and use the beds and shores up to the high water mark of any such watercourse or lake, and acquire the right by purchase, or by condemnation and purchase, or otherwise, to any water, water rights, easement or privileges named in this chapter, or necessary for any of said purposes, and the city or town may acquire by purchase or condemnation and purchase any properties or privileges necessary to be had to protect its water supply from pollution. Should private property be necessary for any such purposes or for storing water above high water mark, the city or town may condemn and purchase, or purchase and acquire such private property. No such dam or other structure shall impede, obstruct, or in any way interfere with public navigation of the lake or watercourse.

SECTION 80.40.050:

AUTHORITY TO ACQUIRE AND OPERATE UTILITIES. A city or town may also construct, condemn and purchase, purchase, acquire, add to, maintain, and operate works, plants, and facilities for the purpose of furnishing the city or town and its inhabitants, and any other persons, with gas, electricity, and other means of power and facilities for lighting, heating, fuel, and power purposes, public and private, with full authority to regulate and control the use, distribution, and price thereof, together with the right to handle and sell or lease any meters, lamps, motors, transformers, and equipment or accessories of any kind, necessary and convenient for the use, distribution, and sale thereof; authorize the construction of such plant or plants

by others for the same purpose, and purchase gas, electricity, or power from either within or without the city or town for its own use and for the purpose of selling to its inhabitants and to other persons doing business within the city or town and regulate and control the use and price thereof.

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